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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
BEFORE THE HONORABLE RICHARD SEEBORG  
ANGEL FRALEY, et al., )  
 )  
Plaintiffs, )  
 )  
VS. ) NO. C 11-1726 RS  
 )  
FACEBOOK, INC., )  
 ) San Francisco, California  
Defendant. ) Friday  
 ) June 28, 2013  
 ) 10:01 a.m.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiffs: THE ARNS LAW FIRM  
515 Folsom Street  
Third Floor  
San Francisco, California 94105  
BY: ROBERT S. ARNS, ESQ.  
ROBERT C. FOSS, ESQ.  
STEVEN R. WEINMANN, ESQ.  
KEVIN M. OSBORNE, ESQ.  
and  
JONATHAN JAFFE LAW  
3055 Hillegass Avenue  
Berkeley, California 94705  
BY: JONATHAN JAFFE, ESQ.

For Defendant: COOLEY LLP  
101 California Street  
Fifth Floor  
San Francisco, California 94111-5800  
BY: MICHAEL RHODES, ESQ.  
JEFFREY GUTKIN, ESQ.  
MATTHEW D. BROWN, ESQ.

Reported by: BELLE BALL, CSR #8785, CRR, RDR  
Official Reporter, U.S. District Court

(Appearances continued, next page)

**APPEARANCES, CONTINUED:**

**For Objectors:**

**CENTER FOR CLASS ACTION FAIRNESS  
1718 M Street  
No. 23-6**

**Washington, DC 20036  
BY: THEODORE HAROLD FRANK, ESQ.**

**CHILDREN'S ADVOCACY INSTITUTE  
5998 Alcala Park  
San Diego, California 92110**

**BY: ROBERT CHARLES FELLMETH, ESQ.**

**LAW OFFICE OF ALAN J. SHERWOOD  
1300 Clay Street  
Suite 600**

**Oakland, California 94612  
BY: ALAN J. SHERWOOD, ESQ.**

**LAW OFFICES OF JAY RORTY  
835 Cedar Street  
Santa Cruz, California 95062**

**BY: JAY ADAM RORTY, ESQ.**

**KOREIN TILLERY  
505 North 7th Street  
Suite 3600  
St. Louis, MO 63101**

**BY: AARON MICHAEL ZIGLER, ESQ.**

**Public Citizen Litigation Group  
1600 20th Street N.W.  
Washington, DC 20009**

**BY: SCOTT MATTHEW MICHELMAN, ESQ.**

**JOHN C. TORJESEN & ASSOCIATES  
612 North Sepulveda Boulevard  
Los Angeles, California 90049**

**BY: JOHN TORJESEN, ESQ.**

**Reported by:**

**BELLE BALL, CSR #8785, CRR, RDR  
Official Reporter, U.S. District Court**

1 **FRIDAY, JUNE 28, 2013**

**10:01 A.M.**

2 **P R O C E E D I N G S**

3 **THE CLERK:** Calling Case C-11-01726, Fraley, et al.  
4 versus Facebook.

5 Counsel, please state your appearances.

6 **MR. ARNS:** Good morning, Your Honor. Robert Arns for  
7 Plaintiffs.

8 **THE COURT:** Good morning.

9 **MR. RHODES:** Good morning, Your Honor. Mike Rhodes,  
10 of Cooley, and my team here at the table (Indicating), on  
11 behalf of Facebook.

12 **THE COURT:** Good morning.

13 **MR. WEINMANN:** Good morning, Your Honor. Steve  
14 Weinmann for the Plaintiffs.

15 **MR. JAFFE:** Good morning, Your Honor. Jonathan  
16 Jaffe, Jonathan Jaffe Law, for the Plaintiffs.

17 **THE COURT:** Good morning.

18 **MR. FOSS:** Good morning, Your Honor. Robert Foss for  
19 the Plaintiffs.

20 **MR. OSBORNE:** Kevin Osborne for the Plaintiffs.

21 **THE COURT:** Good morning.

22 We're here on the hearing to determine whether or not  
23 final approval is appropriate with respect to the proposed  
24 settlement of this class action. This is how I would like to  
25 proceed so we can have an orderly process.

1 First, I will invite the proponents of the settlement to  
2 make a short presentation. I just was handed up a very  
3 lengthy -- it appears to be a PowerPoint presentation. I don't  
4 want that. I really want to just have a -- a back-and-forth,  
5 as opposed to a lecture.

6 So what I would like to do is to have, as I say, the  
7 Plaintiffs and counsel for Facebook go ahead and summarize for  
8 me their points. I have read through the voluminous papers, so  
9 we don't need to repeat all that. I'll have some questions for  
10 all of you.

11 Then I will hear from the objectors who wish to make any  
12 presentations that they wish to make. I'll then allow the  
13 settlement proponents to respond. I request that the fees  
14 issue we put at the end, and we can have a discussion about  
15 that once we have gone through the basic particulars of the  
16 proposed settlement.

17 So, with that, I'll go ahead and invite Plaintiffs to  
18 begin the process.

19 **MR. ARNS:** Thank you very much, Your Honor.

20 First of all, the class has spoken, and we have had  
21 614,944 claims filed. There's been 6,825 opt-outs. There's  
22 104 objections, and as you know, Your Honor, most of those are  
23 e-mail with one sentence.

24 There's eleven briefs. Of all the objections,  
25 Your Honor, 60 percent -- 40 percent of them state that class

1 actions are bad, there shouldn't be class actions. So that --  
2 really aren't objections.

3 That leaves approximately 60-point --

4 **THE COURT:** Well, they're more than class actions are  
5 bad; they're questioning your case.

6 **MR. ARNS:** That's correct, Your Honor.

7 **THE COURT:** Right.

8 **MR. ARNS:** That's correct. And so what we have, in  
9 essence, Your Honor, is .04 objections per million people in  
10 this class. And we think that the class has overwhelmingly  
11 endorsed this settlement.

12 Now, Your Honor, I would just like to take a few seconds.  
13 We're prepared to go any way you want on this, and fully  
14 understand this has been fully briefed.

15 One of the things that I would like to talk about is what  
16 is Facebook. And we know that it's a social media site, that  
17 it costs \$2 billion a year to run it at this time. It's free  
18 to its members. And it's a marketing site, it's an advertising  
19 site, as is Google and many other sites. That's what pays for  
20 these online services.

21 **THE COURT:** Let me ask you some specific things with  
22 respect to the proposed settlement that I want you to address  
23 for me. Let's talk for a moment about your valuation of the  
24 injunctive relief.

25 Now, that has relevance, and we can talk about it later

1 with respect to your request for fees. I'm not sure it is as  
2 necessary to put a dollar figure on the injunctive relief for  
3 purposes of assessing whether or not this is a fair, reasonable  
4 and adequate settlement. So that is sort of the preamble to my  
5 question.

6 I have some trouble understanding your various theories of  
7 how you value the injunctive relief. You have got a fair  
8 market valuation and another --

9 **MR. ARNS:** Option.

10 **THE COURT:** -- form of option that your experts are  
11 opining on. My concern is, you seem to continue to conflate  
12 benefit you assess to Facebook as damage to the class members,  
13 and I think that's a logical leap that is not entirely clear to  
14 me.

15 But beyond that, I just don't -- most of it seems very  
16 highly speculative, and I don't -- I am having trouble with all  
17 of the theories of your valuation.

18 **MR. ARNS:** Your Honor, let me respond to that. We  
19 have the theories summarized on Slide 41. And it's all  
20 briefed, and you know exactly what they are.

21 But, one of the most important parts of the injunctive  
22 relief is that 99 percent of this class of 150 million class  
23 members, members on Facebook, will get the benefit of this  
24 injunctive relief now, and in the future.

25 There are many class actions, Your Honor, where the

1 injunctive relief only is provided if somebody buys another  
2 product, if somebody does this --

3 **THE COURT:** My question is the valuation issue. I  
4 understand that there is injunctive relief, and your position  
5 is that it is of great benefit to the class. I'm not saying  
6 that I have concluded it anything but that.

7 But I'm -- I don't see how you value it at between -- I  
8 believe it's 54 and \$140 million dollars. I'm having trouble  
9 seeing how you do that.

10 So you can assume for purposes of my question that I'm  
11 not -- I'm not doubting there's some benefit to the class.  
12 Although I note that one of the objectors, I think, yesterday  
13 filed something that said -- I'll ask Mr. Rhodes about this --  
14 that Facebook is not even going to do sponsored stories any  
15 more.

16 But we'll get into that later --

17 **MR. ARNS:** Right -- we have that --

18 **THE COURT:** -- in terms of the value of the  
19 injunctive relief that you place on it.

20 **MR. ARNS:** Yes. Your Honor, all my life, as a  
21 plaintiffs' attorney since 1975, I have been asking juries to  
22 put price on the priceless. And this is something, we know it  
23 provides great value to the class.

24 How do you put a monetary value on that? You can look at  
25 the different analyses. You can compare the common fund that

1 we are dealing with, \$20 million.

2 And, Your Honor, I want to thank you very much for your  
3 direction that you did at our first preliminary approval  
4 hearing, because we were -- we're in love with the injunctive  
5 relief on the Plaintiff's side.

6 We think that it sets a new standard for all social media  
7 sites in the United States. We believe that they know if they  
8 don't -- if there is not full notice and full control on  
9 advertising -- and this what -- this is the new form of  
10 advertising that --

11 **THE COURT:** Well, let me stop you, Mr. Arns. I -- I  
12 understand that. I think we are ships that are passing in the  
13 night, on my question. Your responses to me are that this is a  
14 real benefit. And let's assume I agree with you, that there's  
15 benefit in the injunctive relief.

16 What I'm trying to get at is, you then put a price tag on  
17 that. And the analysis, I'm having trouble following as to how  
18 you quantify this with the numbers, which are rather large,  
19 that you place on the value of this injunctive relief. And I'm  
20 trying to, in fairness to you, understand how you get there.

21 **MR. ARNS:** Perhaps this, Your Honor, that we know  
22 that the analytics of this case show that those that have been  
23 included in sponsored stories, and that was -- when Judge Koh  
24 issued her motion -- ruling on the motion to dismiss, she said  
25 that the statutory damages of 3344 are not a vested right. You



1 must show that there was actual damage first.

2 We spent a lot of time, Your Honor, with respect to our  
3 experts -- we had five experts, as you know -- before the  
4 motion for class certification. The case settled approximately  
5 two days before the motion for class certification. And the  
6 whole thing, all of -- they were all marketing experts and  
7 economists, with a couple of software folks. And the issue  
8 was: What was the actual damage? And the actual damage was  
9 approximately 94 cents per person. We had to prove that in  
10 order to get to the 3344.

11 Now, at that time people did not have notice or control.  
12 Now they have notice and control. And what I would say,  
13 Your Honor, just citing the case, the Netflix privacy decision  
14 that just came out, Judge Davila said (As read):

15 "The settlement amount -- which includes the size of  
16 the cash distribution, *the cy pres* method of  
17 distribution, and the injunctive relief -- to be a  
18 factor that weighs in favor of approval."

19 And the case law, as you know, Your Honor, on the  
20 valuation of injunctive relief is that just because it's  
21 difficult to evaluate doesn't mean we shouldn't put a value on  
22 it.

23 I have done a lot of banking cases, Your Honor, where we  
24 know exactly what the late charges that were improper were, in  
25 the past and in the future. That's very easy to work with.

1 Because this is a little more difficult, I would implore the  
2 Court to try to put a value on it.

3 I believe the Court could say that although it is  
4 difficult to put a value on this, it is of great value to the  
5 class. And again, the class members every day who use Facebook  
6 will get that benefit, and they have the notice and control.

7 And perhaps you could say, Your Honor, that the value is  
8 at least that of the common fund that's paid here. We know --

9 **THE COURT:** Twenty million?

10 **MR. ARNS:** We could say that, Your Honor. We believe  
11 it's a lot more.

12 **THE COURT:** I understand that, but I understand you  
13 say that it's worth a lot more. And that's what I'm trying to  
14 get at: How do you calculate that?

15 And I understand you have got this real option valuation  
16 and fair market value, or minimum value. And as I read through  
17 the presentation, as I said, I'm having trouble seeing where  
18 this is not just, you know, a speculative theory as opposed to  
19 something that I think really supports those numbers. That's  
20 what I'm trying to give you an opportunity to explain to me.

21 **MR. ARNS:** This is difficult to evaluate. There's no  
22 question about it, Your Honor. And we will fully admit that.  
23 But again, the crown jewel of this settlement is the injunctive  
24 relief. As I said at our first preliminary approval hearing,  
25 that if there were no common fund at all, we still think this

1 is a great settlement, getting this injunctive relief. That's  
2 what we worked hardest on, from the Plaintiffs' side, to  
3 change.

4           **THE COURT:** When I didn't approve it the first time,  
5 my view was contrary to yours.

6           **MR. ARNS:** That's correct. And we had a different  
7 valuation method. And we know that the case law does address  
8 that what it cost Facebook is not -- or what it costs the  
9 Defendant is not the way to value the injunctive. We know  
10 those cases, Your Honor. We took these different valuation  
11 methods. We think the option value method is the best. But  
12 looking at all of the methods, Your Honor, irrespective, we  
13 know it has great value.

14           And again, I would implore the Court to say: This is  
15 difficult to evaluate, but the Court knows that it has great  
16 value to the members, and every member will benefit from this,  
17 that's in the class.

18           Additionally, Your Honor, this provides the message, the  
19 legal message, to every one of these online sites, as we have  
20 discussed -- Facebook said this is the holy grail of  
21 advertising now, having a friend endorsement. We don't care if  
22 some celebrity endorses a product. We know that celebrity has  
23 been paid a lot of money to endorse the product. But when a  
24 friend endorsed the product, that has value.

25           Do friends become celebrities --

1           **THE COURT:** They have value to Facebook. The  
2 question is, is there a damage to the class members. And one  
3 does not automatically equal the other.

4           **MR. ARNS:** Just as Judge Koh mentioned, it is not a  
5 vested right that we have to prove that damage. We spent a lot  
6 of time proving damages in this case.

7           **THE COURT:** Okay. Let me shift to a different  
8 subject.

9           And I will ask you about this as well, Mr. Rhodes, but I  
10 want to give Mr. Arns the first chance to address it with me.

11           There is some discussion in the papers that perhaps an  
12 additional, an adjustment upwards, because the way the numbers  
13 are shaking out in your proposal, that those class members that  
14 have made claims could go from \$10 up to \$15. And as I'm  
15 seeing your papers, you are almost suggesting that that would  
16 be appropriate.

17           The settlement papers themselves, when they went out, the  
18 notice -- and my concern about that, and I'm not indicating  
19 that in the event I approve it, I'm not going to go that path.  
20 But what occurred to me was how clear is it, or was it, to  
21 class members that that might occur. Because I think what you  
22 have told me, over 6,000 people opted out -- is that correct?

23           **MR. ARNS:** That's correct, Your Honor.

24           **THE COURT:** And my concern, quite frankly, is would  
25 they have opted out if they thought -- was it clear to them

1 that it might be \$15?

2 So, on the one hand, I'm not averse to the idea that some  
3 enhancement of the amount is some path that would be  
4 appropriate, but I'm just a little concerned on the fairness  
5 notion, that when the settlement was presented, was it clear  
6 that it might be more than \$10.

7 **MR. ARNS:** Yes, Your Honor. On Slide 35 -- and I  
8 might point out to the law clerks, the slides are behind you,  
9 if you want to grab those and look at them (Indicating).

10 **THE COURT:** Okay. Go ahead.

11 **MR. ARNS:** Now, Your Honor, Slide 35, we quote the  
12 language on the bottom, which is from the long-form Notice of  
13 Settlement, Page 6. It specifically says --

14 (Off-the-Record discussion between counsel)

15 **MR. ARNS:** Yes, Exhibit 2 to the amended settlement  
16 agreement, Your Honor.

17 **THE COURT:** Okay.

18 **MR. ARNS:** (As read):

19 "If paying \$10 to each Authorized Claimant does not  
20 exhaust the Net Settlement Fund, the remaining funds  
21 will be distributed to the not-for-profit  
22 organizations identified below, unless the Court  
23 orders otherwise as discussed in Section 2.3(b) of  
24 the Settlement Agreement."

25 You know, Your Honor, I'm not going to quote the whole

1 language. It basically says that you have the right to  
2 increase the pro rata payment to each authorized claimant.

3 But the key language, going back to the long-form notice,  
4 Page 6, after that first paragraph it says (As read):

5 *"Again, no one knows in advance how much, if*  
6 *anything, Authorized Claimants may receive, and no*  
7 *one will know until the deadline for submitting*  
8 *claims passes."*

9 So that is in italics, and it makes it very clear. And,  
10 by nature of notice, case law and notice, everyone in the class  
11 has notice of that. So we believe, Your Honor, there is not a  
12 notice problem at all.

13 **THE COURT:** Okay. Or, the related concept, any  
14 unfairness to someone who has opted out. You think they were  
15 on -- they were --

16 **MR. ARNS:** Correct.

17 **THE COURT:** They were on notice that it might be more  
18 than \$10.

19 **MR. ARNS:** Yes.

20 **THE COURT:** Okay.

21 **MR. ARNS:** And we know, Your Honor, the monetary  
22 benefit would go from 1.6 million, approximately, to 9 million,  
23 224 million.

24 (Reporter interruption)

25 **MR. ARNS:** 9,224,000.

1           **THE COURT:** Okay. Let me shift -- and I realize I'm  
2 bumping around. That's the reason, not -- and you can  
3 certainly refer to what you have prepared. I didn't mean to  
4 suggest it's not something that is useful. I just didn't want  
5 you to launch into it in a lecture form because I have  
6 questions rather than that.

7           **MR. ARNS:** Yes, Your Honor.

8           **THE COURT:** But you can certainly continue to refer  
9 to it, and it is helpful.

10          **MR. ARNS:** I had a pretty good lecture prepared. I  
11 would never lecture Your Honor, but --

12          **THE COURT:** I'm sure it was very good.

13          A completely different subject, but -- and in the grand  
14 scheme of life, not an enormous amount of money, but a concern  
15 that I want to address with you, and that's the incentive  
16 payments for the class representatives.

17          I read through the *Radcliffe* decision again, and I agree  
18 that this is not a *Radcliffe* situation, at least as I  
19 understand it, because there isn't any tie, either in the  
20 retainer agreements -- I want you to confirm this for me -- or  
21 in the settlement documents, that essentially require the class  
22 representatives to support the settlement. And that was the  
23 particular concern in *Radcliffe*.

24          **MR. ARNS:** Right. That's correct.

25          **THE COURT:** Okay. But *Radcliffe* does -- I know

1 Mr. Rhodes's papers say *in dicta*, but the *Radcliffe* case does  
2 talk about concern of the disparity between what class members  
3 are receiving, and a big delta between that and an incentive  
4 payment award. And in this instance, let's use the 15-dollar  
5 figure for purposes of discussion, class members would be  
6 receiving \$15, but you're proposing that the three class  
7 representatives receive \$12,500.

8 **MR. ARNS:** That's correct, Your Honor.

9 **THE COURT:** That's an enormous difference when you  
10 just look at the gap between the two. Doesn't the *Radcliffe*  
11 decision suggest that that is a problem?

12 **MR. ARNS:** No, Your Honor. And let me explain why.

13 *Radcliffe* again, as you know, was that if you do not  
14 support the settlement, then you are, in essence, opted out as  
15 a class rep.

16 **THE COURT:** And actually, let me just stop you there  
17 because I asked you to confirm it for me, neither the retainer  
18 agreements nor the settlement documentation ties incentive  
19 payments to support for the disposition.

20 **MR. ARNS:** Absolutely not, Your Honor, they do not.

21 **THE COURT:** Okay.

22 **MR. ARNS:** Now, let me just say this: I would like  
23 to talk about discovery later, but in every deposition -- and  
24 we have two minor class reps, and then we have Susan Mainzer,  
25 who is an adult; J.D. has now reached the age of majority.



1 And again on Facebook, Your Honor, as you know, you have  
2 to be a teenager. There are no children allowed --

3 **THE COURT:** Below 13.

4 **MR. ARNS:** -- on Facebook; 13 and above. So between  
5 13 and 17, before the age of majority, are the only minors on  
6 Facebook.

7 In every deposition, J.D., W.T., and Susan Mainzer -- and  
8 for that matter, Angel Fraley, because her deposition went,  
9 although she dropped out -- the question --

10 **THE COURT:** She is an objector, isn't she?

11 **MR. ARNS:** She is an objector in that she wants some  
12 money. She supports the settlement -- as a matter of fact,  
13 Your Honor, I think she deserves something. I mean, she gets  
14 more phone calls and media requests than anybody, and she  
15 dropped out because of privacy concerns.

16 And I would say this, Your Honor. We made a motion to  
17 preclude her deposition. It was denied because she was a class  
18 rep. And she had her deposition taken too. And I would ask  
19 that we transmute 5 million -- excuse me -- \$5,000 of our fees  
20 to her, if the Court would approve that, if we have case law to  
21 support that, because of what she went through.

22 But what I want to point out, Your Honor, what the class  
23 reps did, and this is one of the key parts of this case, and  
24 that's the 3344 fee-shifting statement, 3344(a), the prevailing  
25 party is entitled to costs and fees.

1 In every one of those depositions, including the minor  
2 depositions, Facebook asked the question: "Do you understand  
3 that you are responsible for all of the fees and costs that is  
4 being generated in the defense of this case?"

5 And it was first asked: "Have your attorneys explained  
6 that to you?"

7 I, of course, objected: "Objection, invades  
8 attorney/client privilege."

9 But that was a fact of life. Every one of those  
10 depositions went the full seven hours.

11 Now, query, Your Honor: Is it ethical for a lawyer to  
12 hold a client harmless in this situation?

13 And this is a for-real situation, as you know, in *Friend*  
14 *Finder*, your case, the *Robyn Cohen* case, Facebook came in and  
15 asked for over \$700,000 in fees. And the response at that  
16 time, I believe, was that the Court never got jurisdiction,  
17 motion to dismiss was granted.

18 **THE COURT:** That was my conclusion, right.

19 **MR. ARNS:** Yes. And we got by the motion to dismiss.  
20 This was very real. And this is something -- if I can just  
21 save a little time by talking about this, as far as the  
22 objectors are concerned also.

23 **THE COURT:** Okay.

24 **MR. ARNS:** The objectors never have any skin in the  
25 game. They -- I believe the Court should rule, if they fail on

1 their appeals -- should be subject to 3344 fee shifting and  
2 have to pay the fees that were generated.

3 Now, we have the case law on that, Your Honor. We know  
4 the --

5 **THE COURT:** I'm not sure -- even if that was  
6 something I was inclined to entertain, I'm not sure that would  
7 be part of the approval process.

8 **MR. ARNS:** It is not, Your Honor. And we believe,  
9 although the First Circuit in the *Skolnick* (Phonetic) case  
10 recommends that, we believe the Ninth Circuit, in the *Azizian*  
11 (Phonetic) case, states that the District Court should not do  
12 that, it should be the Appellate Court that does that, but  
13 recommendations could be made.

14 Now, this -- not only the *Robyn Cohen* case, the *D. Cohen*  
15 case where the demurrer was granted with leave to amend --

16 **THE COURT:** So, down in L.A. Superior?

17 **MR. ARNS:** That's correct. And that is one of the  
18 precursor cases of CMD That team is on CMD

19 **THE COURT:** Right.

20 **MR. ARNS:** They dismissed that case. They didn't  
21 want to take it up on appeal. And that was dismissed -- or  
22 excuse me, the demurrer was granted with leave to amend based  
23 on COPPA, the Children's Online Privacy Protection Act.

24 And Her Honor ruled in that case that -- that the demurrer  
25 was granted with leave to amend because COPPA only dealt with

1 12 and under, they protected minors 12 and under. The minors  
2 on Facebook, as we have discussed, are 13 to 17; thus, case  
3 thrown out.

4 Now, that case did not involve sponsored stories. It  
5 involved Facebook ads with social content. So in that case  
6 over \$800,000 were requested in fees by Facebook.

7 And by the way, we found out what Mr. Rhodes' hourly  
8 billing was on that issue, Your Honor, and this goes in the fee  
9 motion, it was \$930 an hour, if I could just say this for a  
10 second?

11 **MR. RHODES:** It's an absolute bargain, Your Honor.

12 **MR. ARNS:** Can I say this, Your Honor? I would wager  
13 that those -- those hourlies were ratcheted down for purposes  
14 of the Court. I believe Mr. Rhodes is worth more than that,  
15 and I bet he charges more than that.

16 But at any rate, our class reps --

17 **THE COURT:** Of course, you all have hourly fees way  
18 in excess of mine, so -- but go ahead.

19 **MR. ARNS:** Your Honor --

20 **MR. RHODES:** We are not going to establish or quarrel  
21 with the value proposition represented by our hourly rates,  
22 Your Honor.

23 **THE COURT:** That is all right.

24 Go ahead.

25 **MR. ARNS:** As I said, Your Honor, the A-students

1 become the judges. So --

2 **THE COURT:** Okay.

3 **MR. ARNS:** At any rate, so this was a tremendous  
4 concern of these class reps and, if you have 150 million  
5 members in a class, and the class reps are supposed to have an  
6 equation similar to that, in our wage-and-hour cases.  
7 Your Honor, in our wage-and-hour cases where we get \$200,000,  
8 \$150,000 per member of the class, and the class is made up of  
9 500 people, that applies, that 100 percent applies. That is a  
10 frivolous objection, as are all of them.

11 And I think there is one objection -- I'm sorry for --  
12 maybe we can cover this. There's one objection that  
13 potentially had some validity. And that is, if Facebook is  
14 going to change the name of sponsored stories, and then go out  
15 and do this under a different name -- and I can tell Your Honor  
16 that I spent a lot of time crafting the definition of  
17 "sponsored stories," additionally in our settlement. So even  
18 if they change the name it doesn't matter. And I don't -- so  
19 we have that covered.

20 Additionally, Your Honor, you have the right to do an  
21 audit, and we would request that.

22 Additionally, Your Honor, one of our continuing  
23 responsibilities is to monitor Facebook. And Mr. Rhodes --  
24 Mr. Rhodes and I had a meeting based on that. And we don't  
25 talk a lot, but we did have a meeting on that. And the meeting

1 had to do with what is happening here.

2 And Mr. Rhodes, who, as counsel of Facebook, can explain  
3 it further because he has spoken with Facebook on that -- maybe  
4 you want him to address that right now, because he has the  
5 press release that that objection was based on.

6 But irrespective, Your Honor, I can go right to our  
7 release provision that addresses that. And it --

8 **THE COURT:** We'll get there in a moment. And now you  
9 have covered for me -- remember, we started with the incentive  
10 payment issue in terms of my question.

11 **MR. ARNS:** Yes.

12 **THE COURT:** And I understand why you, why you have  
13 gone where you have gone. But let me ask you a couple more  
14 things, and then I'll ask Mr. Rhodes to address some issues.

15 I do -- and this actually takes us to the objectors'  
16 points, so perhaps I ought to wait on this. But I do want to  
17 cover with you at some point the minor subclass issues because  
18 those tend to be, I think, the -- the bulk, if you will, of the  
19 objections, and I want to go over that with you.

20 Actually, why don't you go ahead and address that --

21 **MR. ARNS:** Sure.

22 **THE COURT:** -- in summary fashion because I know we  
23 are going to hear more about it. But, go ahead.

24 **MR. ARNS:** Yes, Your Honor. We like to call it the  
25 teenager subclass. Because we know, Your Honor, that first of

1 all, the teen subclass claims are not stronger than the  
2 subclass claims. Judge Murphy, when he transferred CMD here,  
3 stated the SRRs apply; the SRRs, the California venue  
4 provision, California law provision.

5 And, in essence, we have a situation, Your Honor, where,  
6 the teenagers continue to use Facebook. We have the implied  
7 consent situation as well as the actual consent. And --

8 **THE COURT:** "A situation" meaning defenses.

9 **MR. ARNS:** Yes. Well, not only defense, but that's  
10 what's happening, the teenagers don't want to leave Facebook.  
11 They say: "Oh, my God, I'm going to sponsor a story, I'm never  
12 going to use Facebook again."

13 They continue to use it, continue to commit the social  
14 actions which create the sponsored stories. Now, every one of  
15 those sponsored stories, they are going to see every one  
16 they're in.

17 When we talk about the injunctive relief, actually, again,  
18 Mr. Rhodes, when we were talking about the objection pertaining  
19 to the -- the pseudonym of sponsored stories, which was going  
20 to create a problem, I asked him to present the slides on the  
21 injunctive because he deals with Facebook and they have how the  
22 injunctive is going to change the mockups on that.

23 I have everything in my presentation also, Your Honor, but  
24 I believe a --

25 **THE COURT:** The actual mockups for -- yeah, I did --

1           **MR. ARNS:** Mr. Rhodes has those.

2           **THE COURT:** Right.

3           **MR. ARNS:** And he gave me some of those, but he's  
4 better equipped because -- to talk about that.

5           Now, one-third of the teens on Facebook already have --  
6 are linked up to their parents already. And I'm not going to  
7 talk about the injunctive necessarily too much right now, but I  
8 would like Mr. Rhodes to follow up on the teenage issue, with  
9 the parents' ability, whether they're on Facebook or not, to  
10 opt out the teens. The fact that they check a box, whether or  
11 not they have a parent on Facebook. If they don't, they're  
12 out, they're opted out. This teen subclass faces the exact  
13 same risk.

14           And again, Judge Murphy's decision from the Southern  
15 District of Illinois is very important on this analysis. We  
16 get into family law, we don't think that family law issue at  
17 all applies. And if you look at the Family Code --

18           **THE COURT:** This is Judge Murphy's decision in CMD.?

19           **MR. ARNS:** Yes, yes.

20           And he didn't address the family law issue, but with  
21 respect to that issue, this is not a delegation of power by  
22 using Facebook. This is not in any way covered by the family  
23 law.

24           If -- if we had a situation that blew out those -- the  
25 statements of rights and responsibilities, the terms of use, so



1 to speak, if -- if that occurred, then minors would not be  
2 allowed to use Facebook because they aren't complying, and they  
3 have to comply with SRRs.

4 Now, the minors want to keep using it. The teen subclass  
5 is eligible for the monetary award also. The teen subclass, by  
6 the way, got actual notice of the sponsored stories through the  
7 notice -- the notices in this settlement.

8 You know, Your Honor, one of our minors basically bought a  
9 sponsored story on Facebook, one of our class members, because  
10 he had a -- one of the ways he made money is doing sound  
11 systems for bands.

12 And the point is, this group, 13 to 17, extremely  
13 intelligent group. Yes, there is going to be some immature  
14 minors that are going to do stupid things on Facebook. That's  
15 not the issue in this case. There's a lot of immature adults  
16 who do stupid things on Facebook. That is not the subject of  
17 this case.

18 So the relief also, all the injunctive relief for the  
19 minor class is exactly for -- like that of the adult class, and  
20 it's better. There's no enhanced remedies of law available to  
21 the minor subclass. And all current minors -- again, you look  
22 at the COPPAPPA demurrer that was granted in *D. Cohen*, look at  
23 that.

24 Now, one of the comments that was made by Mr. Fellmeth was  
25 that, "I don't represent minors."

1 And, Your Honor, in 38 years of being a plaintiffs' lawyer  
2 in San Francisco, I have represented thousands of minors. And  
3 I am proud of that fact, and we know that is something, as far  
4 as experience. The minors represent about 13 percent of the  
5 class.

6 Now, with respect -- so at any rate, Your Honor, Judge  
7 Murphy's ruling on CMD -- and again, as the plaintiffs' counsel  
8 in CMD said, "If you say that the SRRs apply, that is ruinous  
9 to our case," because they want to get them out of the SRRs.

10 But do the minor subclass, do they want to keep using  
11 Facebook? Let's ask that question. Any one of them can stop  
12 using Facebook now. You can't -- high school coaches, junior  
13 high coaches, put when practices take place on Facebook.  
14 Assignments, the teachers now put on Facebook. They don't use  
15 e-mail any more. And it is part of the culture, for better or  
16 for worse.

17 And actually, I would like to say this: Having spent time  
18 with the inner circle at Facebook, not in what I would call an  
19 affable way, I tip my hat to the American ingenuity that has  
20 created Facebook. It is an amazing product.

21 I remember when my son said, "Dad, do you want to see my  
22 Facebook page?"

23 I have all the inside information on him. I said,  
24 "Absolutely not. I don't."

25 And then he showed it to me. And he showed me his

1 preschool friends, his junior-high friends, his grade-school  
2 friends, his college friends. He -- and it's amazing that the  
3 connections that -- all the good -- there is a tremendous  
4 amount of good on Facebook.

5 And I want to say from a marketing standpoint, also, I  
6 believe in free enterprise. And marketing creates sales which  
7 creates jobs. Silicon Valley and what happens there is an  
8 amazing driver of our economy.

9 Now, CMD counsel basically had a press conference before  
10 the IPO, of Facebook, and said: Tens of billions of dollars  
11 are at stake.

12 I don't do press conferences that are blackmail to a  
13 company. Let's find out what happens in the case, let His  
14 Honor make the decisions, then we may have a press conference.

15 **THE COURT:** Okay. Let me ask Mr. Rhodes to weigh in  
16 on whatever -- in whatever order. Or if there are other issues  
17 you want to start with, go ahead.

18 **MR. RHODES:** I think I can self-direct through the  
19 Court's questions. I would like -- I do have a PowerPoint  
20 presentation, not to go through but because it contains a lot  
21 of detail for you.

22 I would like to hand you and direct your attention to  
23 Page 5 of that, if I may.

24 (Document handed up to the Court)

25 **THE COURT:** Okay.

1           **MR. RHODES:** For the Court's benefit, the prior  
2 slides are basically just metrical data that you may be  
3 interested in, timelines of what happened when, the deadlines  
4 that are intrinsic to your approval order.

5           So your first question to counsel was: How do you value  
6 the injunctive relief?

7           And my response to you is: You don't need to.

8           And you recall that we discussed this last fall when we  
9 came before you on a preliminary approval order, and I want to  
10 recast the economic framework because I agree with Mr. Arns,  
11 that in the abstract there is intrinsic and perhaps very  
12 substantial value.

13           I'm not going to weigh in to whether the methodologies and  
14 the models that you have been given in the record give you a  
15 concrete basis to make that determination for determining how  
16 to calibrate the strengths and weaknesses of the case versus  
17 what's been circled up in terms of consideration.

18           **THE COURT:** My understanding of your position, just,  
19 if I can summarize it, and you can tell me if this is wrong, is  
20 that just looking at the terms of the settlement as it  
21 currently sits, the 20 million actual cash, and then a finding,  
22 if you will, that there is value in the injunctive relief, that  
23 that is a sufficient overall value to warrant approval of the  
24 settlement.

25           **MR. RHODES:** That's correct, Your Honor. And without

1 belaboring the math on the page I gave you, remember, the  
2 starting point has to be what did the Plaintiffs seek by way of  
3 damages in the case. The objectors make a lot to do about the  
4 statutory damages bogey, but *Lane* clearly says you don't go  
5 through that analysis at all. You don't look at the statutory  
6 damages metrics because it would be impossible to assess them.

7 And in the context of this case --

8 **THE COURT:** Let me stop you there.

9 You don't because it is not a given that every class  
10 member would be able to recover the statutory damages.

11 **MR. RHODES:** You took the words out of my mouth. We  
12 can look at Judge Koh's decision. I think it is Page 27. You  
13 have seen a quote from it already.

14 What's interesting about her quote is not the language  
15 that Counsel just gave you, it's the sentence right after that.  
16 She refers to the word "Proveable."

17 She says: Not only -- you don't just come in and wave  
18 your hands and say, "statutory damages," you have to show  
19 actual injury and actual damages, and they have to be proveable  
20 at trial.

21 And that's where the case starts to fall apart. So if you  
22 assume that *Lane* is correctly decided, which is the current  
23 Ninth Circuit articulation, and you take her at her word, the  
24 math that's on that page is where you leave off.

25 And remember, just as a very quick reminder, the

1 Plaintiffs proffered two theories of economic harm. Theory 1  
2 was that, of the net profits associated with sponsored stories,  
3 remember, gross was about -- I grossed it up through the date  
4 of your preliminary approval order, by the way. So it's about  
5 260. Fifty percent operating margin takes you to 130. They  
6 said two models. One is 75 percent of the net income, or  
7 50 percent.

8       So we just pushed them together and said, "Okay, your  
9 average is 62.5 percent, that is your theory. We disagree with  
10 it, but that's your theory."

11       And so the starting point is a net damage figure in the  
12 75 to 90 million-dollar range. And that is before you do any  
13 litigation risk assessment of all the problems they were going  
14 to face, which I won't burden you with now, but if you go  
15 through the following slides you will see all the deductions.

16       So if you just compare that number with the consideration  
17 in cash, you are in the 20 percent range of total consideration  
18 to the damage model without adjustment. And that's well within  
19 the bandwidth of acceptability in the Ninth Circuit.

20       And that is really the point I'm making, which is, I'm not  
21 suggesting that the Court should or shouldn't put a value on  
22 the injunctive relief; I'm suggesting you don't need to do it  
23 in order to find that the settlement meets the test of being  
24 fair, reasonable, and adequate. So that is my response on  
25 Point No. 1.

1 On Point No. 2, you asked about whether class members were  
2 aware that they could go up to \$15. You expressed some  
3 concern. We see some resonance of that within the objecting  
4 community. How would people know? What would have happened?

5 We specifically contemplated that eventuality in the  
6 notice regime. But, let me give you a couple of record cites  
7 for that. If you go to the Keough declaration -- she is the  
8 class action administrator, Your Honor, and this is Docket  
9 No. 341 -- and you look at Exhibit C, which is the long-form  
10 notice, you can see for yourself exactly how it looks. This is  
11 actually what went out to people.

12 **THE COURT:** Right.

13 **MR. RHODES:** And it tells them three things which are  
14 important: One, you may not even get to \$10. Because,  
15 remember, there was this provision that said we didn't know how  
16 many people would submit claims, and if it went over what we  
17 thought would be the target range, it may reduce it down to as  
18 low as \$5, at which point maybe we do all *cy pres*. We ended up  
19 with valid claims.

20 And this is on Page 2 or 3 of the presentation I gave you.  
21 I actually give you the actual breakout of how it all works  
22 out. Notice, e-mail numbers, claim numbers. If you want to  
23 see it in person.

24 You end up with 780,000 claims, of which about 170,000  
25 were bogus. One guy was particularly industrious, he submitted

1 160,000 bad claims, somebody named Antoine. But this is  
2 Slide 4, Your Honor.

3 **THE COURT:** Okay.

4 **MR. RHODES:** Those people made claims, they  
5 understood that they could get \$10, less than \$10, or more than  
6 \$10, but we couldn't tell them in advance what they would end  
7 up with. So we think it was in the notice, Page 6, Exhibit 2,  
8 of the amended settlement agreement.

9 The third issue you raised has to do with the incentive  
10 awards. And I'm going to take this as an opportunity to  
11 comment on that because in the settlement agreement I said I  
12 wouldn't affirmatively comment on it, but the Court has raised  
13 it.

14 Let's take a look at the *Radcliffe* case again -- excuse  
15 me, let's take a look at the incentive awards again. In the  
16 *Experian* case, they were relying on those *Rodriguez* cases, and  
17 those are the cases that stood for the proposition that, in the  
18 retainer agreement itself, or in the engagement agreement  
19 itself, there was an actual clause that made it conditional  
20 that the named representative plaintiff would support the  
21 settlement in exchange for an incentive award. That was sort  
22 of a *de jure* finding of inadequate representation and made the  
23 settlement suspect.

24 **THE COURT:** Right. Indeed, it was the basis on which  
25 the settlement was --



1           **MR. RHODES:** Invalidated.

2           **THE COURT:** -- said should be invalidated.

3           **MR. RHODES:** Exactly. And so, *Experian* and *Radcliffe*  
4 picks up that thread.

5           Now, the facts in *Experian* are -- and the Court actually  
6 noticed this -- the Court says explicitly that incentive awards  
7 are absolutely commonplace. And, indeed, we see them all the  
8 time.

9           But what the Court notes is that we rarely see one like  
10 this where the approval or support for the approval of the  
11 settlement is made conditional on the receipt of an incentive  
12 award.

13           And I did suggest in *dicta* -- that it is *dicta* about the  
14 size of the award. I mean, you have to have some record,  
15 obviously, upon which the Court makes its decision. I'm not  
16 quarreling with that.

17           But if you look at what the case actually says, they hold  
18 that, quote (As read):

19                   "The conditional incentive awards themselves are  
20                   sufficient to invalidate the settlement."

21           And then they just go on to express some opinions about  
22 the relationship between the level of activity investment by  
23 the named representative plaintiffs and the award they get.

24           The game-changer here is the one that Mr. Arns  
25 represented, which is that these Plaintiffs, unlike a lot of

1 other cases, because of the unique nature of the statute under  
2 which their claims were being made, they faced a fee risk.

3 **THE COURT:** But you do agree that 3344 does change  
4 the dynamic for purposes of assessing the incentive --

5 **MR. RHODES:** Yes. Because --

6 **THE COURT:** -- because the risk is different for  
7 class reps in that circumstance.

8 **MR. RHODES:** And, it's not mythical in this case.  
9 Because last fall, you and I were arguing about whether you  
10 were going to give me \$700,000 against similarly situated  
11 people. So, you've seen that we have made that motion before.

12 We believe that in the appropriate case, we would be  
13 entitled to those fees if we prevailed, and that that is an  
14 intrinsic risk that these people face. And I think that is a  
15 variable that does change the calculation.

16 Your last question, explicit question, was on the minor  
17 subclass. And a lot of the objectors are making the point,  
18 pushing the argument that they should be carved out or  
19 separated. So, let me give you a couple of things to think  
20 about.

21 First of all, the claims were identical for the minors as  
22 for the parents. They were made under 3344. The complaint was  
23 exactly the same: "I pushed the 'like' button, a story ran in  
24 some feed, and then a third party could pay Facebook a fee to  
25 boost that same story."

1        That was a sponsored story. The claims were identical, no  
2 difference at all.

3        Two: Two of the three named representative Plaintiffs  
4 currently in the case were minors.

5        Now, interestingly, Mr. Duvall has transitioned from a  
6 minor to an adult because the case has been around at the time  
7 where he straddled the ages of 17 to 18. But you actually had  
8 a majority of the named representative Plaintiffs were minors.

9        Three: COPPA preempts the landscape of state law. I  
10 really don't think this is a debatable proposition, although  
11 the objectors want to go there.

12                **THE COURT:** This is the L.A. Superior decision you  
13 were going to direct me to?

14                **MR. RHODES:** Yeah. Judge Weintraub. But more  
15 fundamentally, just the structure of the statute.

16        At one point in the drafting, they expressly contemplated  
17 the sub-13-year-old verifiable consent of a parent regime  
18 (Indicating quotation marks) for teenagers. They got a lot of  
19 objections about First Amendment and other rights. They took  
20 it out, and then they expressly said: Anything to the contrary  
21 is preempted.

22        So there is a unitary interest across the minor class  
23 relative to the state lawsuits that these objectors are going  
24 to champion.

25        Next, and I can't give you a precise number, but I asked

1 Ms. Keough: Can you tell me whether or not the people seeking  
2 cash out of the pot, any of them were minors?

3 I don't know the number, but it is more than 10,000, it is  
4 many thousands of claimants were minors. So the process is  
5 working the same for minors as it is for parents.

6 Next, they -- the objectors, I should say, cite that *Fife*  
7 case, F-I-F-E. Judge Wilken. Right? Are you familiar with  
8 this case?

9 **THE COURT:** Right.

10 **MR. RHODES:** And what's very interesting about that  
11 case, Your Honor, and this is Case No. 12-1894, Document 44, in  
12 the docket, Page 17. She expressly distinguishes Judge  
13 Murphy's opinion on a very simple factual ground.

14 What she notes there is that -- in Judge Murphy's case,  
15 the case that was transferred and is now before you and is  
16 currently stayed, she says, in that case there was nothing in  
17 the record to suggest that the minors weren't going keep using  
18 Facebook. They don't get to come in and disaffirm a contract  
19 while continuing to reap the benefits of the service that  
20 Facebook provides. So, she says that decision is correctly  
21 decided.

22 And then again on Page 17, Lines 15 through 17, she says  
23 but my case is different.

24 And remember, this is just a motion-to-dismiss case. This  
25 is a pleading case.

1           **THE COURT:** Correct.

2           **MR. RHODES:** She says, "Based on the allegations I'm  
3 given, I'm told that the minors want to disaffirm the entire  
4 contract." And so she says that's a meaningful distinction  
5 about whether or not there's a distinction between the consent.

6           The reason I mention that, the objectors are trying to use  
7 the *Fife* decision to as a way to say that the minors can't  
8 consent at all to the SRRs. And even Judge Wilken's opinion  
9 says no, that's not true; it has to do with what the intent may  
10 be.

11           We don't think you get to those analyses for the reasons  
12 you have seen in our papers, with COPPA and whatnot. But I  
13 want to point out to you that the objectors, like much of their  
14 argument, it is not tethered to the record. And they misstate  
15 the facts, and they misstate the law, repeatedly.

16           Next, both minors and parents are governed by the same  
17 SRR, governed the same body of law, California. So in terms of  
18 trying to identify whether there are meaningful and substantial  
19 dissimilarity between the interests of the minors and the  
20 interests of the parents, in this case, on this record  
21 (Indicating), there isn't.

22           And so these are fictional arguments raised by Mr. Zigler  
23 and his -- his like, in order to preserve some ability to sue  
24 Facebook for something. That's what this is really about. But  
25 there was complete symmetry of interest across the board.

1           **THE COURT:** The -- again, this sort of is one that I  
2 assume we will deal with, with some of the objections, but  
3 what -- recently, what was submitted to me yesterday, which was  
4 the suggestion that Facebook was going to go in a different  
5 path, Mr. Arns has already made some reference to that. But,  
6 do you want to comment on that now?

7           **MR. RHODES:** Yes, Your Honor. May I hand you two  
8 documents? And, just for the Record, one is Exhibit 8 to the  
9 amended settlement agreement. The other one is a printout from  
10 the official Facebook blog (Indicating) on this issue that they  
11 have raised.

12           (Document handed up to the Court)

13           **THE COURT:** Go ahead.

14           **MR. RHODES:** So, if you go to the papers to which you  
15 were alluding -- these were submitted by the Schachter  
16 objectors, let's refer to them as -- they assert falsely that  
17 the injunctive relief that we are proposing here is fictional  
18 because Facebook is going to pull the rug out from underneath  
19 the Court and no longer do sponsored stories.

20           So if you look at the docket that you are currently  
21 holding --

22           **THE COURT:** Just relabel it in some fashion.

23           **MR. RHODES:** Right. And this was something that was  
24 expressly contemplated during the negotiations here.

25           And as you recall, you and I have crossed this bridge

1 before. I think it was 2009. Because you raised the question  
2 from the bench at that hearing about *Bekin* (Phonetic), about  
3 how do you define a function?

4 And we gave some thought to this. And if you look at the  
5 amended settlement agreement, and you look at the definition,  
6 it basically has three specific parts to the definition of what  
7 a sponsored story is.

8 So if you look at the definition it says, first, it's  
9 anything that Facebook calls a sponsored story. Without  
10 limiting the generality of that, it also includes and then  
11 lists a whole series of examples.

12 Third, it says, without limiting the generality of that,  
13 why don't we prepare a lengthy chart (Indicating) of examples  
14 of the ad products that would meet this definition.

15 And all three of those definitions together comprise the  
16 definition for purposes of what you are being asked to order as  
17 an injunction that pertain to sponsored stories.

18 And what I would ask you to do is take a look at the  
19 Facebook blog posting and Exhibit 8, and compare the two. And  
20 you'll see that it's very clear that Facebook isn't saying  
21 sponsored stories are gone. They're saying the name of that ad  
22 format is being phased out and, as the author of the blog post  
23 says, sponsored stories will be part of the ad formats going  
24 forward.

25 It's too cute by half to suggest that I can just stop

1 doing sponsored stories under one name and avoid the injunctive  
2 relief.

3 But, again, let me give you a concrete example of this, in  
4 practice. So if you take a look at the bound material I gave  
5 you, there is an example in here, if you go back, and I'll find  
6 the page number for you in a second.

7 Take a look at Page 25. Now, what we try to do in these  
8 series of pages -- and again, I'm not going to go through these  
9 today, I just gave this as a reference guide for you, for  
10 purposes of crafting your opinion. If you look at the  
11 right-hand column on Page 25, and you see the highlighted  
12 language in yellow, that is what's new. What is on the left is  
13 what's old. So this is an example of one part of the  
14 injunctive relief package that is being proposed.

15 And you will see that under the revised terms, Your Honor,  
16 there is a reference in that first revision to sponsored  
17 stories. You see that?

18 **THE COURT:** Yes.

19 **MR. RHODES:** And the modifier is "such as," which  
20 means "for example."

21 But then look at the body below that, where it says "You  
22 give us permission", and if you read the totality of that  
23 language, including the new language that starts, "This means,  
24 for example...", there's no reference to any particular ad  
25 format in that language. We understood that.



1       The point of this case was the Plaintiffs were saying, "We  
2 don't think you described the process well enough by which you  
3 might get paid for boosting one of these stories."

4       And so we defined it in a very holistic, very broad way.  
5 And we gave you concrete examples, textually, graphically, and  
6 in a more title way. And the totality of that tells you that  
7 this, you know, eleventh-hour argument (Indicating) is just,  
8 sort of, made of whole cloth.

9       More fundamentally, if you go look at the Schachter  
10 exhibits themselves, and read them, it says things like,  
11 "Include the best of sponsored stories for all." The exhibits,  
12 themselves, that they attach don't support the proposition they  
13 are advancing.

14       The *L.A. Times* article, Exhibit 1, it says, quote  
15 (As read):

16               "One of the ad formats that Facebook is ditching is  
17 sponsored stories."

18       But then look what it says. This is Page 1 of 2 of  
19 Exhibit 1, Your Honor.

20               **THE COURT:** Right.

21               **MR. RHODES:** "It is folding it into other types of  
22 advertising," consistent with the blog post.

23       Exhibit 2 to the Schachter objection -- this is the  
24 article from *Advertising Age* -- on Page 2, Mr. Boland  
25 (Phonetic) states (As read):

1 "Sponsored stories as an idea doesn't go away.

2 Sponsored stories as a product goes away."

3 They're just doing away with the name of that format.  
4 They're trying to simplify their advertising formats. So,  
5 there's nothing in the record to support this objection.

6 And even if there were, I would submit to you that we  
7 built in a safeguard, which is, if you think about the  
8 tripartite consideration that is at issue here, which is the  
9 bucket of economic relief, the *cy pres*, and the injunctive  
10 relief -- the *cy pres* and the injunctive relief, part of the  
11 implicit message there is that: We are funding and empowering  
12 a community of watchdog and advocacy groups to keep an eye on  
13 us, and there's a built-in audit right, so if anybody thinks  
14 that we are not complying with the Court's injunction because  
15 we're playing games (indicating quotation marks) with the  
16 definition of "sponsored stories," you can order me to account  
17 for it. And you also have that inherent power through the  
18 discretion of the Court.

19 And then, Your Honor, let me give you one last document,  
20 as an aid to the Record.

21 There were 104 objections of one kind or another lodged.  
22 We said there were 17 valid, and 87 invalid. But we responded  
23 to every one of them, regardless of how we characterized it.

24 So what I've done is, I've created an index for you, of  
25 every single objection. Summarized the basis of it, and cited

1 to the Record where there is a response to that objection.

2 I'd like to give that to you, if I can.

3 **THE COURT:** Okay.

4 (Document handed up to the Court)

5 **MR. FRANK:** Could the objectors get a copy of that?

6 **THE COURT:** Pardon?

7 **MR. FRANK:** Can the objectors get a copy of that?

8 **THE COURT:** I don't know how many copies he has here.

9 **MR. ARNS:** The objectors have the briefs, Your Honor.  
10 They know where every response is.

11 **THE COURT:** All this is, is just an index of  
12 summarizing where to find things. It's not making an  
13 additional argument.

14 **MR. RHODES:** I'll happily answer any specific  
15 questions, Your Honor. I've tried to give you some materials  
16 that summarize, obviously, a very voluminous record. I don't  
17 want to repeat what we have said in our materials.

18 **THE COURT:** Okay. I appreciate that, and I think  
19 what I will do at this point is look to the objectors, to go  
20 ahead and give them an opportunity to elaborate on their  
21 objections, although not an open-ended opportunity. I want to  
22 move it along, because we do have several people that have  
23 indicated a desire to address the Court.

24 So, let me start with Mr. Fellmeth. Have I pronounced  
25 that correctly?

1           **MR. MICHELMAN:** Actually, Judge, would -- if you will  
2 permit me, Scott Michelman, Public Citizen, on behalf of the  
3 Schachter objectors. I've coordinated with my fellow  
4 objectors, including Mr. Fellmeth, Mr. Frank, Mr. Zigler, and  
5 Mister -- Mr. Sherwood, all of whom are here today, and we have  
6 agreed upon an order and a division of labor which we hope will  
7 minimize repetition and streamline the presentation of the  
8 arguments.

9           Would you have --

10          **THE COURT:** I always encourage that.

11          **MR. MICHELMAN:** -- or would --

12          **THE COURT:** That's fine, if you are representing to  
13 me that that is exactly what this is going to do. I don't want  
14 repetition, and so I appreciate your comment.

15          Are you suggesting that you will now be presenting the  
16 argument, but am I -- do all the people who have listed  
17 themselves as wanting to speak, all still want to speak?

18          **MR. MICHELMAN:** My understanding, Your Honor, is that  
19 myself, Mr. Fellmeth, Mr. Sherwood, Mr. Zigler, and Mr. Frank  
20 are the five objecting counsel who are here today to speak.

21          I would first propose to outline to you what we plan to  
22 cover, and then cover my piece, and then turn it over to the  
23 other objecting counsel to cover their pieces.

24          **THE COURT:** Well, okay. Go ahead.

25          **MR. MICHELMAN:** Thank you, Your Honor. Once again,

1 Scott Michelman, Public Citizen, on behalf of the Schachter  
2 objectors.

3 Your Honor, this is the order in which objecting counsel  
4 proposes to proceed today. I'll be addressing, on behalf of  
5 the Schachter objectors, the issues of minors and the  
6 misappropriation statutes, including California Civil  
7 Code 3344, and the possibility that it's preempted by COPPA.

8 I'll then be addressing the argument we made this week  
9 about the redefinition or abandonment of the sponsored stories  
10 program.

11 Then a fellow objector, Robert Fellmeth, of the Children's  
12 Advocacy Institute, will be addressing provisions of the  
13 California Family Code, and broader concerns about minors'  
14 rights.

15 Mr. Sherwood, Alan Sherwood, will be addressing notice  
16 deficiencies and fees.

17 Mr. Frank, of the Center for Class Action Fairness, will  
18 be addressing structural problems, including class definition  
19 and the claim rate.

20 And finally, Aaron Zigler of Korein Tillery will be  
21 addressing the over-breadth of the release.

22 **THE COURT:** Okay. The individual who wants to speak  
23 about the fees, I would put that person after we conclude the  
24 other objections, because as I indicated before, I put that at  
25 the end of the discussion. So, I'll give that person an

1 opportunity to make whatever comments they want to make, but I  
2 want to hold that off from the initial part.

3 And also, just for timing purposes, I did block the  
4 morning out, but that -- the morning, in my mind, and we are  
5 probably going to take a break at some point so that the court  
6 reporter can rest her hands, the outside of this is 12:30,  
7 because I have to move on to other things. But, just keep that  
8 in mind.

9 So, go ahead.

10 **MR. MICHELMAN:** Understood, Your Honor. I'll try to  
11 be very direct.

12 So beginning with the issue of minors and  
13 misappropriation, the parties actually do not dispute that  
14 California Civil Code 3344, and the laws of six other states  
15 referenced in our brief, including the laws of Virginia,  
16 Wisconsin, Tennessee, Oklahoma, New York, and Florida, prohibit  
17 the use of a minor's likeness for advertising without parental  
18 consent. They don't dispute that. And they don't dispute that  
19 this proposed settlement does not solve that problem. There  
20 are proposed safeguards which will help in some cases.

21 Mr. Arns said today that one-third of minors are linked to  
22 their parents on Facebook. I would say, what about the other  
23 two-thirds? Because --

24 **THE COURT:** How do you police that? What is your  
25 proposal as to -- your premise is that minors -- and in this

1 instance we are talking about 13 to 17 -- without parental  
2 consent should simply be precluded from participation?

3 **MR. MICHELMAN:** Either precluded or --

4 **THE COURT:** How do you do that?

5 **MR. MICHELMAN:** Well, I think -- I mean, I'm -- I  
6 don't have the technological capacity, but I imagine that  
7 Facebook does. In fact, in this very settlement, Facebook has  
8 said if minors indicate affirmatively, take the step to  
9 indicate their parents are not on Facebook, they -- Facebook  
10 will stop using their images.

11 I would propose a better settlement would say unless the  
12 minor is connected to a parent, and the parent affirmatively  
13 consents, then Facebook does not use the minor's likeness. And  
14 that's in order to comply with the laws of --

15 **THE COURT:** Aren't we in a universe where, whatever  
16 you craft, at the end of the day you're -- to use the honor  
17 system is not a precise way to describe what I'm getting at,  
18 but you're always going to be dependent on the input you are  
19 receiving from the user. I mean, there's no way to know the  
20 age of the person on the other end of the electronic  
21 communication.

22 **MR. MICHELMAN:** That is true, Your Honor. But  
23 contrast what will happen in the bulk of cases, where minors  
24 will simply, quote-unquote, represent -- and that is the  
25 language of the settlement agreement -- that their parents

1 consent? What happens if everybody -- if the users jump  
2 through the hoops set out through the settlement agreement?

3 In that case, the parents would indicate his or her  
4 relationship to the minor, the minor would indicate his or her  
5 relationship to the parent, and then the parent would use the  
6 controls to either opt the child out or consent.

7 Now, obviously, there, one can imagine fraud, one can  
8 imagine people pretending other people are their parents. And  
9 I agree with Your Honor, at some -- at the end of the day  
10 there -- some things are going to slip through. But, that is a  
11 much more serious safeguard and protection for the rights of  
12 these minors, all these state laws, accepting a mere  
13 representation by the minor that his or her parent consents.

14 And, and the reason that these state laws are so important  
15 is, in part, that they're state laws, and there are seven of  
16 them, and they cover -- they include three of the largest four  
17 states by population, California, New York, and Florida.

18 But, furthermore, both Facebook and class counsel have  
19 argued, and they have repeated the argument here today, that  
20 California law should control. And if that's the case, then  
21 California law, Section 3344, which clearly prohibits this  
22 practice, would govern all Facebook users.

23 Now, they don't actually dispute any of this. But  
24 instead, Facebook in particular presses the preemption  
25 argument, the COPPA preemption argument. And Mr. Rhodes finds



1 it not debatable that COPPA preempts this -- all of these  
2 statutes.

3 I'm -- I should -- understated, I find that conclusion  
4 surprising. It is true that there is the *David Cohen* case out  
5 there, that is a summary decision with no analysis of a state  
6 superior court. When --

7 **THE COURT:** Is there any case going the other way?

8 **MR. MICHELMAN:** Not specifically on this issue,  
9 Your Honor. But when we look to the law of the United States  
10 Supreme Court on preemption, the controlling decision is  
11 *Sprietsma versus Mercury Marine*, in which the Supreme Court  
12 held that the Coast Guard's failure to provide a specific type  
13 of propeller guard -- they considered it and decided against it  
14 -- did not expressly or impliedly preempt tort laws in other  
15 states that would require the propeller guards.

16 **THE COURT:** Well, there's lots of preemption law out  
17 there. I mean, there's not just that case. I mean, we have  
18 all sorts of precedent we can look to about how we analyze a  
19 preemption argument, and it's either expressly preempted or the  
20 various other stages along the path.

21 But the simple fact is in this particular area there's  
22 only, I guess, one decision out there, and that is contrary to  
23 your view. Now, I understand it's from a state court, so a  
24 state trial-level court, I understand that, but the fact is --

25 **MR. MICHELMAN:** Without a lot of analysis.

1           **THE COURT:** But the fact is, there is nothing going  
2 the other way.

3           **MR. MICHELMAN:** There is nothing going the other way  
4 specifically on this issue, but the -- the arguments are quite  
5 weak. The express preemption argument relies on a clause that  
6 prohibits treatment, quote, "inconsistent with the treatment of  
7 those activities or actions under this section."

8           Well, the treatment of the activities and actions under  
9 this section is treatment of activities and actions with  
10 respect to 12 and under. It just doesn't say anything either  
11 way about 13 to 17. So the express argument, I would submit,  
12 is not -- is facially not -- not very persuasive.

13           As to implied conflict management, the Supreme Court has  
14 held that it is possible for Congressional or regulatory  
15 inaction to have a preemptive effect. But that is only true  
16 where, either by Congressional or regulatory design, the choice  
17 of the -- the area that has not been regulated has been a  
18 deliberate area of nonregulation, that -- that the Federal  
19 Government has chosen to leave open.

20           And for example, in *Geyer*, you have a 15-year regulatory  
21 history of the Department of Transportation deciding  
22 specifically that it wanted to leave the choice open, in the  
23 area of auto safety, and not have state laws that provided  
24 different standards.

25           Here you have nothing like that. You have a few witnesses

1 at a hearing, and the deletion of a provision that is not --  
2 that is never explained, in terms of preempting state laws to  
3 the contrary or making sure that minors 13 to 17 have all the  
4 kinds of freedom that one could imagine they might have.

5 **THE COURT:** Let me shift the focus for a moment with  
6 you. What -- the nature of the harm that is being -- that you  
7 identify, that the users are incurring here -- and I -- I  
8 realize that this may get into the various statutes that you  
9 say are particularly targeted at protecting minors.

10 But, the nature of the injury that you identify, how is it  
11 any different between an adult and a 13- to 17-year-old, in  
12 terms of using their likeness for purposes of, in this  
13 instance, sponsored stories?

14 How is it at all different, and why is it more pronounced  
15 for a minor than it is for an adult?

16 **MR. MICHELMAN:** I'm glad you asked that question,  
17 Your Honor, and particularly since the parties argue that  
18 everybody's claims are the same. And we agree, the claims are  
19 the same. But the protections provided by statute are not.

20 The State of California, and six other states as well,  
21 have decided that because of minors' youth, there should be  
22 more safeguards in place that protect them against rash  
23 decisions that they may make when they are 14 years old. That  
24 puts the parent in a position to -- to give consent and to have  
25 some oversight. That's -- and so even if the injury is the

1 same, the states have chosen to provide a greater level of  
2 protection. And the problem with this settlement agreement is,  
3 it does not respect that choice. In fact, it authorizes --

4 **THE COURT:** I guess what I'm trying to ask is, what  
5 is it about the status of an individual, as a 13- to  
6 17-year-old, that you can point me to that says they have  
7 incurred this harm, and it's more pronounced because they are a  
8 13- to 17-year-old, there's something about the nature of this  
9 that is identified as the harm here, which is the use of the  
10 likeness without consent, for advertising purposes.

11 Why is that more harmful to a 13- to 17-year-old than it  
12 is to an adult? I'm just trying to get a handle on -- I  
13 understand your point, and I'm not minimizing it, that  
14 legislatively there is some extra protection that you say is  
15 there for that particular group of the population.

16 But what is it about the nature of this particular conduct  
17 that you think is -- has a particularly pronounced effect on a  
18 13- to 17-year-old, as opposed to an adult?

19 **MR. MICHELMAN:** Well, minors -- and the Supreme Court  
20 has said this as well -- minors have, in certain respects,  
21 diminished capacity for judgment and diminished, for example,  
22 culpability in the criminal sphere. And so it's been  
23 recognized as a matter of public policy.

24 **THE COURT:** That's why they may click "like" without  
25 the benefit of maturity, if such there be. I understand that.

1 But what I'm asking about is, having done that, how have they  
2 been injured in a way that is particularly pronounced? In a  
3 way that is different from the adult putative class members?

4 **MR. MICHELMAN:** Well, they may have made decisions,  
5 they may have chosen to like things and be tagged that way on  
6 the Internet forever, without having necessarily thought  
7 through the consequences in the manner an adult would. And I  
8 sense I may have not --

9 **THE COURT:** So they made a bad decision about what to  
10 like.

11 **MR. MICHELMAN:** They made a bad decision, but it is a  
12 decision that the legislators of seven states have said they  
13 should be protected from. And this settlement authorizes  
14 conduct that violates all of those laws, including the law of  
15 California, which a party says governs. And that's a serious  
16 problem with this settlement.

17 And, several courts have said that courts should not be in  
18 the business of approving settlements that authorize or  
19 perpetuate violations of other laws. And this does that.  
20 Because, as the parties do not dispute, minors' images will  
21 continue to be used, under this settlement, without parental  
22 consent. And that violates these laws.

23 I would like to address one more point on the minors  
24 before I move to the issues of changing the name of sponsored  
25 stories. And that is, it's been suggested today by the

1 parties' counsel that minors have all the protection they need  
2 because they can just get off Facebook.

3 That was true before this suit was filed. So, in terms of  
4 whether this settlement provides any benefit, it doesn't. The  
5 minor can always make the decision, "You know what, I'm going  
6 to get off Facebook, and withdraw all of this, and step out of  
7 this whole area."

8 That's not what the settlement purports to give them. The  
9 settlement purports to give them more, purports to give them  
10 new options and more protections, and it doesn't do that. For  
11 most minors, the law will continue to be violated.

12 So I would like to move on now to the issue of the change  
13 in the name of sponsored stories. Both Plaintiffs and  
14 Defendants put a lot of stock in the definition section, and I  
15 think that's absolutely the right place to turn.

16 This is Section 129 of the proposed settlement agreement,  
17 quote (As read):

18 "The term 'sponsored stories' or 'sponsored story'  
19 means content displayed by or on behalf of Facebook,  
20 that Facebook refers to or markets as sponsored  
21 stories."

22 I think that last phrase, "that Facebook refers to or  
23 markets as sponsored stories," is critical. The definition of  
24 the -- of what this injunctive relief covers, and the term  
25 "sponsored stories" is used repeatedly in the injunctive relief

1 provisions of Section 2.1, that term is defined by reference to  
2 how Facebook refers to and markets it.

3 So Mr. Rhodes makes slighting reference to the exhibits we  
4 have cited, saying thing like, "The idea of sponsored stories  
5 isn't going away, just the name is changing."

6 Well, I understand why Mr. Rhodes would like the idea to  
7 be the critical thing, but that's not what the words say in  
8 this settlement agreement. The words say that the words, what  
9 Facebook refers to and markets as "sponsored stories," is the  
10 critical thing.

11 **THE COURT:** Well, but he, in fairness, has pointed  
12 out that it's a bit broader than that. It's not -- if they  
13 simply, tomorrow, labeled "sponsored stories" as "fun facts,"  
14 and put it out there, or something like that, and didn't abide  
15 by the injunctive relief, they would be subject to the audit,  
16 and they would have various ramifications.

17 I mean, in other words, you are not simply suggesting that  
18 they could, under the terms of the settlement agreement, simply  
19 put a new name on it and blissfully go about without  
20 implementing any aspects of the settlement agreement.

21 **MR. MICHELMAN:** I am, Your Honor.

22 **THE COURT:** I don't agree with you.

23 **MR. MICHELMAN:** I think if we were here -- if they  
24 violated these provisions and they were dragged into court,  
25 Mr. Rhodes would be up here arguing that "sponsored stories"

1 only means, just as it says in 129, what Facebook refers to or  
2 markets as sponsored stories.

3           **THE COURT:** Well, he just said the contrary. So he  
4 couldn't say that, because he's already said that's not the  
5 case.

6           Now, where is it that you think it is so limited? Because  
7 I do see it as saying -- effectively what sponsored stories is  
8 doing, whatever label, whatever one may put as the label and  
9 the name for it, that's covered.

10           **MR. MICHELMAN:** Well, I think it is whatever they  
11 called "sponsored stories." And the rest of the paragraph is  
12 just giving examples of the things they currently call it.

13           But even taking Your Honor's point that this could be read  
14 broader, and perhaps Facebook would be judicially estopped -- I  
15 would hope they would -- to deny that it covers a  
16 reincarnation, because Facebook is changing its practices, we  
17 don't know exactly what that reincarnation looks like. We  
18 don't know if the terms of the settlement in 2.1 are going to  
19 be meaningful, as against whatever new product Facebook comes  
20 up with.

21           And that's a source of concern to objectors, because what  
22 limited relief this offers, in terms of the rights of -- the  
23 rights of certain minors to get parental consent, and the  
24 rights of certain -- certain users to opt out of certain  
25 categories after they have seen a sponsored story, again, these



1 are all fairly limited, but we don't even know how they would  
2 apply, because we don't know --

3           **THE COURT:** But of course, the release wouldn't  
4 necessarily cover that conduct. Because the language of the  
5 release is also important. If the point you are trying to make  
6 is they could come up with an entirely new program that you  
7 think does harm to minors, amongst others, that wouldn't  
8 necessarily be covered by the release that they have agreed to  
9 in this agreement.

10           **MR. MICHELMAN:** Well, the release is fairly broad  
11 because -- and Mr. Zigler will discuss this in more detail, but  
12 one point on the release is that it covers claims which the  
13 releasing parties have or may have against the released parties  
14 arising out of, or relating to, any of the acts, omissions, or  
15 other conduct that was or could have been alleged in this  
16 action, including but not limited to sponsored stories. So it  
17 -- it goes beyond what they are doing now, and could be read to  
18 release additional conduct as well.

19           And, and again, you know, I would welcome hearing  
20 Facebook, and -- well, in particular, Facebook say, oh, that --  
21 that -- you know, in front of you, and in a manner that would  
22 create judicial estoppel -- that this release is much more  
23 limited than that.

24           But I'll -- I'll defer to my fellow objecting counsel,  
25 Mr. Zigler, in discussing the release further.

1           **THE COURT:** Okay. Why don't you summarize, or bring  
2 it to a conclusion.

3           **MR. MICHELMAN:** Sure. To sum up, the lack of  
4 protection for minors for continuing violations of state law  
5 is, by itself, a reason to object -- to reject this settlement.  
6 Because the courts, the federal courts should not be in the  
7 business of authorizing agreements that perpetuate or authorize  
8 the violations of state law.

9           There is no dispute, this will continue to do that by  
10 permitting Facebook to use minors' likenesses without their  
11 parents' consent.

12           And now I'll turn it over to objecting counsel, Robert  
13 Fellmeth, on behalf of the Children's Advocacy Institute.

14           **THE COURT:** Thank you. We will hear from  
15 Mr. Fellmeth, and then we will take a brief break after  
16 Mr. Fellmeth.

17           **MR. FELLMETH:** Thank you, Your Honor. May it please  
18 the Court, I have as Exhibit 12 from the materials here I would  
19 like to hand to the Court, and I have eight copies here for  
20 everybody --

21           **THE COURT:** Very well.

22           (Document handed up to the Court)

23           **MR. FELLMETH:** -- the terms and conditions -- or not  
24 -- rights and responsibilities of Facebook, followed by the  
25 changes being made under this court -- proposed court order.

1           **THE COURT:** Very well.

2           (Reporter interruption)

3           **MR. FELLMETH:** Sorry.

4           Your Honor, I apol -- --

5           **THE COURT:** Just -- yes, go ahead. You're about to  
6 tell me what I was going to ask, which is to identify who  
7 you're representing. Go ahead.

8           **MR. FELLMETH:** I'm Bob Fellmeth, of the Children's  
9 Advocacy Institute, on behalf of the Depot family. And also on  
10 behalf of child advocates generally, I must say.

11           Now, I want to cover some points here that the Court's  
12 already raised: Why are teenagers different? Because they  
13 post things without thought, because they post things they  
14 shouldn't post, because they post things they regret. Because  
15 they're engaged in cyber bullying. Because they're not mature  
16 adults yet.

17           And I represent them, and have for 22 years.

18           **THE COURT:** Although the premise of they post things  
19 without thought is certainly not confined to minors, but --  
20 okay.

21           **MR. FELLMETH:** It is not, but it is a worse problem  
22 with teenagers. And I think any parent with a teenager will  
23 verify this. It is a particular problem with teenagers. And  
24 the damage that comes is enhanced with teenagers.

25           Now, I agree with the Court that whether it's sponsored

1 stories or called "sponsored stories," I don't care about that.  
2 I am more concerned that, if you look at the last two pages of  
3 what I've given you, laying out what the changes being made  
4 here, it moves from (As read):

5 "You can use your privacy settings to limit how your  
6 name and profile picture..."

7 (Reporter interruption)

8 **THE COURT:** You need to slow down.

9 **MR. FELLMETH:** Sorry. This is a bad habit I have.

10 Reporters always hate me. (As read)

11 "...may be associated with commercial, sponsored, or  
12 related content, such as a brand you like, served or  
13 enhanced by us. You give us permission to use your  
14 name and profile picture in connection with the  
15 content, subject to the limits you place. We do not  
16 give your content or information to advertisers  
17 without your consent. You understand that we may not  
18 always identify paid services and communications as  
19 such."

20 Now, I submit that the changed one is much worse for  
21 children, much more -- much broader, much more -- of much  
22 greater concern. And, as the Court has mentioned, not at all  
23 confined to sponsored stories. (As read)

24 "You give us permission..."

25 This no longer a permission with regard to a particular

1 recasting of your postings that we are going to send to some  
2 unnamed group. Now we are saying "You give us permission"  
3 categorically here, automatically, as a term and condition,  
4 No. 10 of 18, in the small-print list:

5 "...to use your name, profile picture, content, and  
6 information, in connection with commercial,  
7 sponsored, or related content, such as a brand you  
8 like..."

9 "Such as."

10 "...served or enhanced by us. This means, for  
11 example..."

12 And then there's an example:

13 "...permit a business or other entity to pay us,  
14 display your name and/or profile picture with your  
15 content or information. If you have selected a  
16 specific audience for your content or information, we  
17 will respect what choice...your choice when we use  
18 it."

19 Keep in mind, though, that the limits on where the stuff  
20 goes is in a very difficult-to-find place in the settings area,  
21 which is not -- you can't get access to that from your profile  
22 page. You've got to go out, and you've got to go in, and  
23 you've got a default entry of "Public." Everybody gets it.

24 So, let me recast this in terms of the teenage problem we  
25 have here.

1           **THE COURT:** Okay. And I'll let do you that, but I  
2 want you to keep in mind, to step back in this process.

3           My function here is not to craft the perfect policy for  
4 minors. That's not what I'm entitled to do. What I am to do  
5 here is to determine whether or not this particular settlement  
6 that has been proposed to me for approval is fair, reasonable,  
7 and adequate. Not could I craft a better policy, or could you  
8 craft a better policy? That is not the -- that isn't the world  
9 in which I operate.

10          So when you are making your arguments, to the extent that  
11 the argument is "Boy, there's a better way do this," that  
12 really doesn't go to the -- the function that I have to engage  
13 in at the moment.

14          It really is, this -- this particular remedy is valueless,  
15 it's not fair, it's not reasonable. I mean, adequate, there,  
16 you may be closer to it, in terms of what you are arguing.  
17 But, just to keep in mind, it is not "Can this be done with  
18 more protection for a minor," because I am not in a position to  
19 craft it. I am here to either accept or reject.

20          So just keep that in mind, and go ahead, Mr. Fellmeth.

21           **MR. FELLMETH:** I understand, Your Honor. I wanted to  
22 emphasize, in terms of what is fair and reasonable, the bottom  
23 line about what this means, you're giving to a third-party  
24 commercial entity, based on this terms and conditions sign-off  
25 (Indicating), the right to take anything you post, to select

1 from it without telling you in advance that you are doing it,  
2 without telling you exactly where you're sending it or what  
3 you're doing, recast it, then send out to a group of people.  
4 You don't know who they are, and you may never know who they  
5 are.

6 Now, this is going on, on the Internet. So that when  
7 somebody gets it, the recalculation, the recasting of what you  
8 have posted -- and I know this is all atmospheric here about,  
9 "Oh, these are sponsored stories, it's 'Like,' it's all  
10 benign." It doesn't have to be benign. It may not be benign.  
11 It may be very, very horrible for the kid involved.

12 So, it goes out. It's permanent. It goes out, and it's  
13 there. And whoever receives it, resends it to other people.  
14 This is a very momentous thing that is happening for a teenager  
15 posting things many times they should not be posting. We want  
16 to have the parent involved in this. There's a fundamental  
17 liberty interest apparent in this country.

18 And I want to add something to the COPPA issue. Because  
19 we have statutes to protect kids, and there's a reason for  
20 them, the statutes in this area and on this subject matter. I  
21 was involved in COPPA. I have been involved in the FTC  
22 regulations to implement it. Yes, the 13- to 18-year-olds were  
23 not included, because we wanted 0 to 12 very harshly included.  
24 And for the 0 to 13, including 12-year-olds, you can't even  
25 collect the information, they can't even get into Facebook,

1 without verifiable parental. In other words, it is a very high  
2 floor.

3 Because you create a very high floor for 0 to 13 does not  
4 mean you have destroyed the floor that exists for 13 to 18.  
5 That is not what that means. And that is not a reasonable  
6 interpretation of a preemption theory in this regard.

7 So if you then look at 3344, and see what it says and read  
8 it, is it not being violated? If you look at the Family Code,  
9 and look at it, and say is it not being violated? They say,  
10 "Oh, no, this is not a delegation. The Family Code says you  
11 can't require delegation. This isn't a delegation."

12 Really? You are saying, "Facebook, you can do whatever  
13 you want, whenever you want, to whomever you want, without  
14 telling me in advance what you are doing and to whom and  
15 where." That is not a delegation?

16 So A is met; C, under *Fife*, is met there. I think that is  
17 a very weak case. I don't even know if I agree with *Fife*,  
18 on C. I agree that if you are paying for something, a child  
19 can be held to that contract. They're receiving the benefits,  
20 there's an estoppel concept, fine.

21 But keep in mind that what we're talking about here is not  
22 a one-dollar addition to the Facebook charge or something. It  
23 is the imposition of an entirely different service. There are  
24 two different services here. A former antitrust prosecutor,  
25 I'm always looking at relevant market. There's a relevant



1 service market here of social networking. Very attractive,  
2 excellent product. I'm a member of Facebook. My kids are.  
3 Excellent product.

4 There's a separate market called "commercial  
5 endorsements." A different market, different service market.  
6 Different people are involved. The advertisers are involved.  
7 It's separate.

8 It's a mistake to tie the two together and say it's all  
9 the same thing, which is what they're doing, and consent for  
10 one means consent for the other.

11 Indeed, in antitrust law, if you have market power in one  
12 service-relevant market, and you use it to jack up distorted  
13 advantage in the other market, that's a per-se tie-in. You  
14 can't do that. They've got to be kept separate. They are  
15 logically separate. You can't use a power in one to get an  
16 advantage in the other.

17 Now, my point there is that you can't give consent -- say  
18 consent of one is consent to the other when they're not the  
19 same. They're different. Different things are happening here.  
20 You've got -- now, I'm not saying that the Court has to say it  
21 has to be perfect, it has to be exactly as Fellmeth wants it,  
22 or whatever. I'm not saying --

23 (Reporter interruption)

24 **MR. FELLMETH:** I'm not saying that it has to be  
25 perfect. I'm not saying that the Court has to impose some kind

1 of arbitrary anything.

2 **THE COURT:** I can't impose an arbitrary --

3 **MR. FELLMETH:** I know you can't. All you can do is  
4 say no. What I'm suggesting is you say no to any inclusion of  
5 minors, given 3344, given the fact that COPPA is not preempt,  
6 given that California law applies -- and you're talking to a  
7 California attorney for 45 years -- California law applies --  
8 who wrote some of these statutes. And the statutes are not  
9 preempted. They are there to protect the kids. There is a  
10 reason for them.

11 And if they wanted -- if they want to have a settlement  
12 that says -- and it's not hard to do, not hard to do -- to say,  
13 "Kid, if you have a parent on Facebook, let us know, and if you  
14 want to do it, we will take whatever we're going to be doing,  
15 whatever -- we're going to be recasting your posts, we're going  
16 to be recasting them, we're going to be sending them to a  
17 group, we'll copy and paste."

18 That takes them no time at all. That's nothing. Copy and  
19 paste, send it to the parent, and say, "Click 'yes,'" just  
20 "Click 'yes.'"

21 Can that be evaded in some way? Can the kids cheat? You  
22 know, kids come home, say, you know, "The dog ate my homework,"  
23 signed "Mom"? I mean, yeah, sure, they can. Sure, they can.  
24 But all we are asking on behalf of children is the bona fide  
25 attempt -- and their parents -- to get parental consent to

1 something that is very momentous, permanent, going out without  
2 prior warning. It doesn't work. It's not beneficial. It's  
3 not adequate, it's not fair, it's not reasonable.

4 I'm asking for the Court to take a close look and to think  
5 about this. This is a -- this is a "wears no clothes" issue.  
6 The kid is wearing clothes (Indicating), but the knights behind  
7 me (Indicating) are not wearing clothes here.

8 I'm asking the Court to *tabula rasa*, look at what it does  
9 and whether or not it complies reasonably with minimum state  
10 statute, minimum common law, with regard to the fundamental  
11 interest of parents, with regard to 3344, with regard to the  
12 Family Act.

13 And by the way, one other just side issue, they say, well,  
14 the Family -- the Family Code has this provision in it that  
15 selects out actors, that is, people who get paid for acting or  
16 art or singing or whatever. And that demonstrates that nobody,  
17 that -- that unless you're in that category, you're not covered  
18 at all. And again, it's the opposite. Again, it is a really  
19 high standard for those people, eight pages of standards,  
20 including even how much they're going to get paid, a minimum  
21 amount they have to get paid is in the statute. Doesn't mean  
22 that the kids who are not getting money for doing things, art  
23 or athletics or whatever, are bereft. It's, again, a higher  
24 standard for them.

25 And by the way, those kids are going to be in this

1 (Indicating) as well. Even the kids who are receiving money  
2 for art or whatever are going to be subject to this  
3 expropriation of their postings. Direct violation of the  
4 detail they paid for. They don't have any mechanism for that  
5 either.

6 So, okay, I'm sorry for -- I'm emotional because I've had  
7 teenage sons.

8 **THE COURT:** Okay. Well --

9 **MR. RHODES:** Your Honor --

10 **THE COURT:** Okay.

11 **MR. RHODES:** For the Record, what counsel, I believe,  
12 is attempting to put before the Court is in the Record at  
13 Docket No. 339, which is Paragraph 12 to the Weinmann  
14 declaration. I don't think it was ever established on the  
15 Record what it was he was waving around.

16 And I would note that this is, I believe, the SRR in  
17 effect for the period of October of 2010, and through October,  
18 2011. So it's kind of a -- really doesn't apply to anything.

19 Thank you.

20 **MR. FELLMETH:** It's what essentially is being  
21 changed. It was a -- not immediately preceding, but very close  
22 to immediately preceding.

23 **THE COURT:** Thank you. Let's take a -- so that the  
24 court reporter who has been in a challenging situation in terms  
25 of following all the comments, let's take a break, and we'll

1 resume at quarter of.

2 And, again, I'm looking to conclude these proceedings at  
3 12:30, so please do keep that in mind. Okay?

4 (Recess taken from 11:33 to 11:41 a.m.)

5 **THE CLERK:** Remain seated. Please come to order.

6 **THE COURT:** Very well, we are back on the Record.

7 And, Counsel, you may proceed. If you could identify  
8 yourself and who you are representing.

9 **MR. SHERWOOD:** Thank you very much, Your Honor. Good  
10 morning. My name is Alan Sherwood. I represent Objector  
11 Jennifer Deachin.

12 Ms. Deachin has asked us to request that the Court not  
13 approve the proposed settlement at this time. Our basic  
14 position has been briefed, so I don't want to repeat what is in  
15 the brief.

16 We believe that Ms. Deachin and all the members in the  
17 class should get a second notice after determining the number  
18 of participants that want to be in the class, and fairness  
19 would then entitle the participants to be told, based on the  
20 number of people in the class, whether or not to opt out at  
21 that point. That it was premature with the notice that's been  
22 presented.

23 I also had some comments to make about the fees, which  
24 I'll reserve for later, but that is basically the two issues  
25 that we wanted the Court to look at.

1           **THE COURT:** So you are saying, a second opportunity  
2 to opt out is what you are thinking should be provided?

3           **MR. SHERWOOD:** Because of the vagueness of what the  
4 proposed settlement would actually be to the class members.

5           **THE COURT:** In terms of the amount of money they  
6 would receive?

7           **MR. SHERWOOD:** Exactly. That it would be more  
8 reasonable, and that it would be a more informed consent-type  
9 of notice, if they were given notice after the number of  
10 participants was determined.

11           **THE COURT:** Suppose, though, that if they -- the  
12 initial notice said \$10, but it could be a different amount, if  
13 the amount then is increased, why would somebody then want to  
14 be opting out at that point? It's only getting more.

15           **MR. SHERWOOD:** Well, Your Honor, I don't have a good  
16 explanation for that.

17           **THE COURT:** Okay. Okay. Thank you.

18           **MR. SHERWOOD:** Very . Thank you.

19           **MR. FRANK:** Good morning, Your Honor.

20           **THE COURT:** Good morning.

21           **MR. FRANK:** Theodore H. Frank, with the nonprofit  
22 Center for Class Action Fairness, on behalf of Objector Sam  
23 Kazman and myself.

24           **THE COURT:** Very well. And you expressed an interest  
25 in seeing the summary, and I'm happy to provide it to you, if I

1 can find where I put it.

2 **MR. FRANK:** I can forego that at the moment.

3 **THE COURT:** All right. Okay. Go ahead.

4 **MR. FRANK:** I would like to raise two 23(a)(4)  
5 issues. First of all, the *Radcliffe* issue. And the animating  
6 concern of the Ninth Circuit in *Radcliffe* is whether the  
7 incentive fee paid to the class representative so distorts  
8 their incentives to agree to a settlement that their interests  
9 diverge from the class that they are supposedly representing.

10 And that's not just the Ninth Circuit. That's the  
11 Eleventh Circuit, in *London versus Wal-Mart*; that's the Sixth  
12 Circuit, in *Midland Funding*. The D.C. Circuit's a bit on the  
13 other side on that.

14 The parties argued that the \$12,000 that the parties are  
15 getting is okay because they are facing a risk from 3344 fee  
16 shifting. I would argue that that cuts in exactly the opposite  
17 direction. Because what the parties are getting are not just  
18 \$12,000, but they're freeing themselves from the risk of  
19 3344 fee shifting that the class does not have.

20 And so they are getting more than \$12,000. They are  
21 getting \$12,000, plus the option value or the expected value of  
22 the risk of 3344 fee shifting. And that's exactly the sort of  
23 distorted --

24 **THE COURT:** How do the class members have that risk?

25 **MR. FRANK:** Because the 3344 fee shifting would

1 not -- Facebook would not say, "Okay, here's our \$5 million  
2 attorney bill, and we are going to bill every class member  
3 28 cents." That's not how that works.

4 **THE COURT:** Right.

5 **MR. FRANK:** At least the class members would have the  
6 opportunity to opt out before --

7 **THE COURT:** I'm not sure I follow you, why the fact  
8 that the named class representatives could be at risk under  
9 3344 in a fee shifting; that, therefore, is it -- your point is  
10 that they have an extra interest in agreeing to the settlement  
11 to avoid the prospect of a fee shift?

12 **MR. FRANK:** That's exactly right, Your Honor.

13 **THE COURT:** Okay. We had a long discussion about the  
14 language in *Radcliffe*, and the focus of *Radcliffe*. And I do  
15 think it is a fair reading of that opinion by Judge Gould, that  
16 the particular issue that was in play was the nature of that  
17 agreement by which the named plaintiffs essentially tied  
18 themselves to joining forces seeking approval of the  
19 settlement. And that is not what we have here.

20 **MR. FRANK:** I completely agree with that. What  
21 happened in *Radcliffe* was certainly sufficient to trigger the  
22 23(a)(4) problem. It isn't necessary. And we see that in  
23 *Rodriguez*, where the Court criticized an incentive payment  
24 agreement that was capped out depending on how much the class  
25 received.



1 And there, well, then the class might have an incentive to  
2 settle at that capped-out amount and not seek anything more so  
3 that they could guarantee the maximum incentive. And the  
4 *Rodriguez* court held that that was problematic.

5 **THE COURT:** The remedy for the concern that you are  
6 presenting to me is that I simply reduce the incentive fee  
7 amount?

8 **MR. FRANK:** That's one way to approach it. That  
9 still creates -- there would still be the 23(a)(4) problem,  
10 that the class wouldn't be an adequate representative because  
11 they're facing a completely different set of risks and benefits  
12 that the rest of the class isn't having.

13 **THE COURT:** But to some extent, isn't that  
14 ameliorated by the fact that the Court has to make the  
15 determination on whether or not the proposed settlement is  
16 fair, reasonable, and adequate?

17 So, to the extent that your concern is, by -- by  
18 definition, these class representatives are in a conflict  
19 situation such that they agreed to something that perhaps they  
20 shouldn't have agreed to, I -- I understand that being part of  
21 the argument.

22 But then, at the point that it is presented to me, if I,  
23 on the one hand, reduced the incentive awards, and, number two,  
24 I deem it to be fair, adequate, and reasonable, I'm not sure  
25 how the process has been infected, if you will, by these class

1 reps.

2           **MR. FRANK:** Certainly, the incentive payments might  
3 be unfair under 23(e), and you could fix that 23(e) unfairness  
4 by reducing the incentive payments.

5           We're taking a different position, that there's a 23(a)(4)  
6 problem. That the class representatives have an incentive to  
7 agree to a settlement without regard to whether they are fairly  
8 representing the class, because of this risk that they face.  
9 And, and, according to class counsel, that was a very  
10 substantial risk that, in part, motivated the settlement.

11           Our second 23(a)(4) point is that we're talking about the  
12 class members who get this \$15, which I think the Court should  
13 exercise its discretion enough at 17 or 18 dollars to exhaust  
14 the settlement fund, rather than have money to go to *cy pres*.

15           But what's really happening is that there are two  
16 subgroups, one of whom gets the \$15, like my client,  
17 Mr. Kazman; and then another subgroup of potentially millions  
18 of class members, who get zero under the settlement because  
19 they are not allowed to make a claim without perjuring  
20 themselves. And that's the subgroup that includes me. I could  
21 not make a claim because before I can make a claim, I had to  
22 attest to things that just weren't true.

23           These two subgroups are uncertified. They're not  
24 separately represented. The parties argue it's okay that  
25 Kazman gets \$15, and Frank gets zero dollars, because they have

1 completely different claims. Kazman has one type of cause of  
2 action, and Frank has a completely different cause of action,  
3 because we would have affirmative defenses against Frank that  
4 we wouldn't have against Kazman.

5 But that's just a concession that the class shouldn't be  
6 certified. That this isn't one single unitary class. That  
7 there are really two subclasses here that haven't been  
8 separately represented, that haven't been separately certified,  
9 and haven't been requested to be separately certified.

10 And that creates the 23(a)(4) problem that we identified.  
11 That's *Amchem*, that's the *Literary Works*, that's *Dewey versus*  
12 *Volkswagen*. And all of them have slightly different facts, but  
13 the principle is the principle.

14 Under *Comcast versus Behrend*, when you have those sorts of  
15 individualized differences, you can't group them together into  
16 a single class. You either need to say the class is equally  
17 situated, and you treat every class member alike, or you say  
18 the class is differently situated, and they have individualized  
19 differences, and you subclass accordingly, and you separately  
20 represent accordingly so that the disfavored subclass is fairly  
21 represented at the settlement discussions.

22 We've extensively briefed a lot of other issues. I'm  
23 happy to answer questions on those. I do want to raise one  
24 rebuttal point. We heard here that there are just very few  
25 objections, whatever the infinitesimal amount is. And,

1 Your Honor, that's why we have class actions. Because it would  
2 be un- -- infeasible for an individual to bring the individual  
3 claim, you group them together and you aggregate the  
4 litigation.

5 And I got attacked in the papers: I hate class actions.  
6 Well, I don't hate class actions. It's a good way to aggregate  
7 these sorts of claims. It's a good procedural device. But  
8 then you can't turn and say, "Aha, all these objectors who have  
9 even less incentive than individual class members to bring  
10 claims, you didn't have 71 million objectors, and, therefore,  
11 the majority of the class supports the settlement."

12 And you can't make that inference. I think if you were to  
13 poll a thousand Facebook members and say, "Here's a settlement,  
14 and it pays some class members \$15, and it pays other class  
15 members zero dollars, and it pays the attorneys \$1,000 an hour,  
16 do you think that's fair?" We know that they're never going to  
17 conduct that study because they would find that a majority of  
18 class members answering it would say, "That's outrageous. It  
19 shocks the conscience."

20 And you can't say that there are only 104 objectors who  
21 jumped through all the hoops, and, in fact, we're going to say  
22 that 87 of them didn't jump through the hoops because we were's  
23 going to impose a different requirement that wasn't in the  
24 notice or in the preliminary order, and call those objections  
25 invalid.

1 Your Honor, I won *Bluetooth* in the Ninth Circuit, I won  
2 *Inkjet* in the Ninth Circuit, I won *Nachshin versus AOL* in the  
3 Ninth Circuit on class action settlement appeals from  
4 approvals. And every one of those, there are fewer objections  
5 than here.

6 It's not the number of objections, but it's the quality of  
7 the objections that matters when you're looking at the  
8 reactions of the class. If they came here, and the class had  
9 had full notice and nobody objected, they can say, "See, the  
10 class doesn't have a problem with this."

11 **THE COURT:** At the end of the day -- so your view as  
12 to what should happen -- obviously you're saying I should  
13 reject the settlement. But is effectively what you are saying,  
14 is that this case, this particular case should simply run the  
15 distance?

16 I mean, that it's not a -- it is not a settleable case  
17 from a class action perspective? The Court should just either  
18 try it, or rule, or dismiss it? Or -- I mean, I'm trying to  
19 get a handle on where you think this all goes if I went down  
20 the path you ask me to go.

21 **MR. FRANK:** I think that's a fundamental problem with  
22 3344. If you look at the statute and why it was passed, it was  
23 passed to protect actors from being unfairly taken advantage  
24 of, and Fred Astaire dancing with the vacuum cleaner and all  
25 that.

1       It's -- or, or, nobody ever envisioned when they passed  
2 the statute that common everyday people that normally nobody  
3 cares about would be grabbed to use for endorsements. And  
4 they're trying to shoehorn that square peg into the circular  
5 hole of 3344.

6       And it may be the case that 3344 isn't conducive to class  
7 actions, at least class action settlements. And that is a risk  
8 that parties have to take going forward, as the Supreme Court  
9 held --

10           **THE COURT:** It puts the defendant in a rather  
11 difficult bind because the defendant then, who wants to settle,  
12 then has to continue to litigate. And you've sort of won the  
13 battle, perhaps lost the war for them. I mean, in a way you're  
14 saying this shouldn't be subject to -- you just decide the  
15 question and litigate the case. And --

16           **MR. FRANK:** Well, if the Defendant is really  
17 concerned about that, and they want a settlement more than  
18 anything else, they can remove the 3344 Sword of Damocles over  
19 the class members' head, and they can say before settlement  
20 negotiations start, "We will not seek 3344 fee shifting in this  
21 case."

22       And once they do that, then the class representatives can  
23 fairly decide, "Yes, I want to go forward with the litigation,"  
24 "No, the settlement is good for the class," without concern  
25 that they have bound themselves to the mast and are facing a

1 financial disaster if they don't agree to a settlement that may  
2 or may not be unfair.

3 And the concern is under 23(a)(4), not are the parties  
4 adequate representatives. And that is a preliminary question  
5 before you get to the 23(e) question. It's not, "Well, because  
6 they negotiated a settlement that is conceptually conceivably  
7 fair, that could have been possibly negotiated by somebody who  
8 wasn't facing these conflicts, then I'm going to go back and  
9 decide that they were adequate representatives."

10 **THE COURT:** Okay. Thank you.

11 **MR. FRANK:** Thank you, Your Honor.

12 **THE COURT:** Thank you.

13 **MR. ZIGLER:** Thank you, Your Honor. My name is Aaron  
14 Zigler. I'm here on behalf of the Shane objectors. I'm going  
15 to try to bring us home.

16 My comments are going to be limited to the release, the  
17 proposed release to the settlement. And then I'm going to try  
18 to bring that, steer that back to the ultimate question which  
19 is before the Court, which is whether or not the settlement is  
20 fair, reasonable, and adequate, which I think we're getting a  
21 little far from at times.

22 The release that's before the Court, to put it kindly, is  
23 ambiguous. There's been several arguments on every side of  
24 that. There's been arguments that the release, itself, covers  
25 far more than sponsored stories. You have heard those.

1 Mr. Arns, on behalf of Plaintiffs, has argued that no, it  
2 is limited to just the sponsored-stories claims. Then, when  
3 prompted with an argument that, you know, maybe sponsored  
4 stories are going away or changing, we were directed to the  
5 definition of "sponsored stories," which was very broad, and  
6 included not just things called "sponsored stories," but other  
7 things that looked or acted like sponsored stories. Which then  
8 brings us back to the release.

9 What is released? Just those things that are called  
10 sponsored stories? Or anything that looks or acts like a  
11 sponsored story, as well?

12 And the reason that that's important, and the reason that  
13 it affects whether or not you can determine if this settlement  
14 is fair, reasonable, or adequate, is because without knowing  
15 what the class is giving up, you can't properly measure what  
16 the value to them was.

17 **THE COURT:** How can you ever craft a release that's  
18 going to be as precise as you suggest?

19 **MR. ZIGLER:** I'm not suggesting I'm precise. I'll  
20 give you a concrete example, Your Honor. We can do it in the  
21 context of the *CMD* litigation, and it goes this way:

22 As has been discussed, the *CMD* covers advertisements where  
23 it has a name or likeness. It includes both sponsored stories  
24 and another group of ads that are called "social ads," --

25 **THE COURT:** Uh-huh.



1           **MR. ZIGLER:** -- right?

2           So the question then is: Does this release knock out just  
3 sponsored stories, or social ads?

4           Mr. Arns has said just sponsored stories. Facebook stood  
5 silent. I would really like to hear from Facebook today that  
6 it's just social ads and not -- not -- social ads. We haven't  
7 heard that from them yet.

8           But then, when you look at this definition of "sponsored  
9 stories" here today, and the question of what the release  
10 really gets rid of, and what the injunctive relief really deals  
11 with, if you look at this definition of "sponsored stories,"  
12 and not just those things called "sponsored stories," but also  
13 those things that act like sponsored stories, it looks a lot  
14 more like it covers more than sponsored stories, and also  
15 social ads.

16           And here's why that's important: If it covers more than  
17 sponsored stories, then the math that Mr. Rhodes gave you  
18 earlier is off by a factor of ten. Because the information  
19 that he gave you was limited to the profits and the earnings  
20 that they earned on sponsored stories only, not on social ads.  
21 That's why this -- this point --

22           **THE COURT:** You know, that goes back to questions  
23 I've had all the way along.

24           The focus on -- on the revenue, or the profit or what have  
25 you that Facebook may or may not have enjoyed by virtue of

1 these programs does not -- the premise of your argument seems  
2 to be it automatically then gives us a -- the boundaries of the  
3 harm that individuals have incurred. And one does not follow  
4 from the other.

5 **MR. ZIGLER:** No, that's exactly right, Your Honor.  
6 And that's one of the reasons why you correctly rejected the  
7 settlement the first time.

8 The value to Facebook does not equal the harm to the  
9 Plaintiffs. All of that should be thrown out. There's no way  
10 that you can measure the settlement on those grounds.

11 **THE COURT:** But then, I thought you just told me that  
12 because I -- I thought you were telling me that because  
13 Facebook -- depending on the position that they take in terms  
14 of the scope of the release, that their revenue or their profit  
15 for activities beyond sponsored stories should go into the  
16 hopper. I thought I heard you say that.

17 **MR. ZIGLER:** If you're going to use that as your  
18 basis, then you have to use the proper universe.

19 **THE COURT:** I see. Okay.

20 **MR. ZIGLER:** But here's the way that it should be  
21 done, Your Honor. When determining -- you look at this as an  
22 individual case.

23 If I came in here and said, "My likeness has been used,  
24 and I want to sue under 3344, I'm entitled to \$750, that is  
25 what I like," Mr. Rhodes says, "Well, I'm going to offer you

1 50 bucks," you know, we would talk about that.

2 I know that at the end I could get \$750-plus attorneys'  
3 fees, or I could take Mr. Rhodes off for \$50 now. That's where  
4 we do the math there. That's *Mars Steel*, from where I come  
5 from.

6 **THE COURT:** So you are focusing in on the statutory  
7 damages?

8 **MR. ZIGLER:** Your Honor, I was just using that as an  
9 example.

10 **THE COURT:** Okay.

11 **MR. ZIGLER:** You look at what the Plaintiffs could  
12 recover. Okay. And here is why the release is important  
13 there.

14 So, to determine what the Plaintiffs here can recover, on  
15 that side of the equation, we have limited it to sponsored  
16 stories. 123 million people were in a sponsored story, and the  
17 parties have agreed to limit their analysis, for whatever  
18 reason, to just one.

19 We haven't looked at the number of times that their  
20 likeness was used, which is probably the proper manner, right?  
21 Because if I have been used in ten sponsored stories, I should  
22 be entitled to more than some person who was used once. Right?

23 So, let's say it was 123 million sponsored stories,  
24 instead of people, which is what the math should be. If you  
25 add in ads to that, now it's 300 million. And that throws off

1 the math again.

2 So now, instead of the \$5 compensating me for the handful  
3 of sponsored stories I'm in, they're offering \$15 now for not  
4 only the sponsored stories that I was in, but also the social  
5 ads and whatever else this release might cover. Without  
6 knowing what the release covers, we can't know if the offer is  
7 adequate, under the requirements of Rule 23.

8 For the rest of our objections, Your Honor, we will rest  
9 on our briefs.

10 **THE COURT:** Very good.

11 **MR. ZIGLER:** Thank you.

12 **THE COURT:** Thank you.

13 Do we have any other objector counsel or objectors who  
14 wish to make any presentation?

15 (No response)

16 **THE COURT:** Okay.

17 **MR. RHODES:** Your Honor, let me jump in. On the last  
18 point, *Lane* teaches -- this is 696 F.3d, 811, Page 8231 -- *Lane*  
19 teaches, quote (As read):

20 "We reject objectors' argument insofar as it stands  
21 for the proposition that the District Court was  
22 required to find a specific monetary value  
23 corresponding to each of the Plaintiffs' statutory  
24 claims and compare the value of those claims to the  
25 proffered settlement award."

1 Mr. Zigler is legally infirm.

2 Two, if you look at the cases cited in our brief, *Officers*  
3 *for Justice*, 688 F.2d, 615, and its progeny, as you have  
4 alluded to, this, today, is not a trial. This, today, is not  
5 an adjudication of claims. This, today, is not an evidentiary  
6 hearing. The question presented is a very different one, and  
7 the Court is very mindful of that standard.

8 But the premise of all these objections, as if you were  
9 adjudicating claims that are disputed -- Mr. Michelman said  
10 that there's a body of law that says you can't sanction, as a  
11 settlement in a class action, the imposition of injunctive  
12 relief where you are enjoining compliance with law. But the  
13 underlying premise there is that there has been a definitive  
14 ruling of law to which the injunction is identical.

15 And here we have a diaspora, a myriad set of claims that  
16 are subject to debate. Things like does COPPA preempt  
17 everything.

18 There's a fundamental misunderstanding about 3344. The  
19 body of jurisprudence under that statute says consent can be  
20 manifested in a variety of ways. Implied consent. Express  
21 consent.

22 So, the assumption that we're litigating and, therefore,  
23 adjudicating these claims today is fundamentally false and  
24 wrong.

25 **THE COURT:** I understand your overriding comment here

1 is that no one has made any decisions on the applicability of  
2 the defenses, of which there are many, that you have presented.

3 **MR. RHODES:** Many.

4 **THE COURT:** Let me ask you some specific things that  
5 have been brought up, and let's go to Mr. Zigler's point, he  
6 being the most recent person up here. And that is the scope of  
7 the release.

8 **MR. ARNS:** Your Honor --

9 **THE COURT:** Sure -- well --

10 **MR. ARNS:** Let me address that, please.

11 **THE COURT:** Each of you will get your chance to  
12 address --

13 **MR. ARNS:** May I go first?

14 **THE COURT:** Go ahead, Mr. Rhodes.

15 **MR. RHODES:** There's a case on point. This is the  
16 Hesse case. I think the Court is familiar with it. I've  
17 pulled it. This is 598 F.3d, 581, Your Honor. This is a 2010  
18 Ninth Circuit case. And Page 7 of the slip opinion -- I  
19 apologize, I can't give you the jump site. But what the court  
20 says there is, the release is absolutely permitted to include  
21 unknown claims.

22 And the question presented, then, in a second class  
23 action, in this instance -- I assume Mr. Zigler would say the  
24 Dawes case that is before you -- is when you have a final  
25 judgment in the first class-action settlement, that goes to say

1 we have wended ourselves through the appeals and we have a  
2 final judgment, what Ninth Circuit says is the test that you  
3 would then be asked to do, assuming we had a settled complaint  
4 in *Dawes*, which we don't (As read):

5 "A settlement agreement may preclude a party from  
6 bringing a related claim in the future, even though  
7 the claim was not presented and might not have been  
8 presentable in the class action where the release  
9 claim is 'based on the identical factual predicate.'"

10 So the question about the scope of the release is  
11 essentially a phantom. The release is specifically modified at  
12 the end of that same set of clauses that Mr. Zigler referred  
13 to, as modified by "sponsored stories." And this goes back to  
14 this argument about the definition.

15 **THE COURT:** So, just being specific about it, the  
16 program, it's called "social ads," is that the program that  
17 Facebook has --

18 **MR. RHODES:** We're not sure what Mr. Zigler's  
19 complaints really reaches. This case (Indicating) is about  
20 sponsored stories.

21 **THE COURT:** Okay. So let me ask you: Is it your  
22 position that -- is there -- there is a program called "social  
23 ads"?

24 **MR. RHODES:** There are ads on Facebook that would not  
25 meet the Facebook definition of "sponsored stories."

1           **THE COURT:**   Okay.

2           **MR. RHODES:**   Some of those ads have what you might  
3 consider to have social content.

4           **THE COURT:**   And is your view that the release in this  
5 case reaches those -- any claims that arise out of those  
6 programs?

7           **MR. RHODES:**   My answer is I don't know until I have a  
8 final judgment in this case, an operative complaint in another  
9 case, and you comply with the *Hesse* factors (Indicating) as to  
10 how you go about determining whether or not the release covers  
11 the one or the other.

12           And that's why we gave you a definition, contrary to what  
13 Mr. Michelman said, that is both in the title and in the  
14 function of what a sponsored story was. It's not simple as  
15 what Facebook calls a sponsored story. It is meant to be  
16 broader than that. I'm entitled to that release. That's what  
17 this case was about. We've described it for you three  
18 different ways.

19           And if what Mr. Zigler ends up suing us about in his case  
20 is, in fact, the same thing as what was covered by that  
21 release, then I would submit to you, I would be well within my  
22 grounds to say that case is dismissed. Indeed, his words to  
23 you were prophetic, weren't they? He says it covers him.

24           But to say that it covers everything on Facebook, that's  
25 too much. And I'm not saying that. I'm saying it covers



1 sponsored stories, as defined. And I can't speak to what he  
2 may ultimately bring as a cause of action.

3 **MR. ARNS:** Your Honor --

4 **MR. ZIGLER:** Your Honor --

5 **THE COURT:** No, no. Thank you.

6 **MR. RHODES:** You dismissed that complaint, as you  
7 know.

8 **THE COURT:** I know.

9 Go ahead.

10 **MR. ARNS:** If I can say this, Your Honor. Slide 51,  
11 in anticipation of this argument, lays out again the definition  
12 of "sponsored stories." And the release claims talk about  
13 "sponsored stories." A sponsored story is a sponsored story.  
14 We know the difference between different types of advertising  
15 on Facebook. It's complicated. But this case dealt with  
16 sponsored stories.

17 So -- and the great news, Your Honor, is that his case,  
18 *CMD*, is allegedly coming in here for another objector.  
19 Mr. Zigler also happens to be the attorney for *CMD/Dawes*, as  
20 you know.

21 **THE COURT:** I'm aware of that.

22 **MR. ARNS:** And you know that that's in front of you.  
23 That's the great thing, Your Honor. It is all in front of you.  
24 So --

25 **THE COURT:** Well, that's -- whether or not that's

1 great is another story. But, okay. Well --

2 **MR. ARNS:** You will know the exact scope of this  
3 release.

4 **THE COURT:** Yes.

5 **MR. ARNS:** And our case dealt with sponsored stories.

6 **THE COURT:** Okay.

7 **MR. RHODES:** The test in *Hesse*, Your Honor, is  
8 whether there's identity of the underlying factual pattern,  
9 and not the names that are put in the release. That's the  
10 point that the Ninth Circuit is trying to make.

11 **THE COURT:** Okay. Let me ask you on the point that  
12 Mr. Frank brought up, and that is that the 3344 -- presence of  
13 3344 actually works in a contrary fashion in terms of the  
14 incentive payments because, if I was following his argument,  
15 the -- with this Sword of Damocles over the representative  
16 Plaintiffs, they have a vested interest, and a contrary  
17 interest in some respects, to do a deal so they can get out  
18 from under 3344, and, therefore, they are conflicted in some  
19 sense as class representatives.

20 **MR. ARNS:** Your Honor, as their --

21 **THE COURT:** You can go first on this one, Mr. Arns.

22 **MR. ARNS:** Thank you very much, Your Honor.

23 As their attorney, I had numerous conversations with them  
24 about this, that I'm not going to get into because of the  
25 attorney/client privilege. And I can represent to you that the

1 spectra of 3344(a) fee shifting never stopped anything in our  
2 prosecution of this case.

3           **THE COURT:** Well, you know, I'm sure that the -- the  
4 counsel in *Radcliffe* would have said it didn't affect at all,  
5 and perhaps it -- it never did

6           **MR. ARNS:** (Nods head)

7           **THE COURT:** But the question is more: Is there a  
8 problem in terms of -- you know, as you know, often in conflict  
9 situations, it doesn't mean the actual conflict was created and  
10 impacted the situation. It's the presence of the potential  
11 conflict that's the problem.

12           So, I'm perfectly willing to accept your representation  
13 that not a single decision was made with the -- with the  
14 particular concern to get class representatives out from under.  
15 But his point is just, as -- if I was following you correctly,  
16 just like in *Radcliffe*, there is an aspect of the reality that  
17 puts those class representatives in a very different posture  
18 than those they purport to represent, and that, therefore, they  
19 have structurally an incentive to -- to agree when perhaps  
20 that's not in the interest of the class who are not going to be  
21 subject to a 3344 obligation.

22           **MR. ARNS:** Understood, Your Honor.

23           **THE COURT:** Okay.

24           **MR. ARNS:** You know, one of the things that Mr. Frank  
25 said in his papers is that every one of these cases should have

1 been individual cases, everybody should have the right to  
2 prosecute the 3344 issue, themselves.

3 And Mr. Frank, as we know, has never met a lawsuit that he  
4 liked. Mr. Frank, when he comes in, he doesn't want the class  
5 reps to get any money because that promotes class actions.

6 **THE COURT:** Well, but that doesn't really matter, for  
7 purposes of my question. He's -- I don't care what his  
8 motivation is for presenting a particular argument. My  
9 question is to address the argument, itself.

10 I have -- I -- it's triggered the thought in my mind that  
11 there is an issue at least to be addressed with respect to  
12 whether or not that puts the class representative in a very  
13 different posture in a 3344 situation.

14 And so I want you to address that. Not why he may have  
15 made the argument, or his grand view on the -- on the facility  
16 of class actions.

17 **MR. ARNS:** Yes. Your Honor, what I would say is that  
18 was probably one of the 100 factors that are used in this --  
19 that were used in this case to make a determination whether, on  
20 two days before the class cert hearing was going to take place,  
21 whether we could hammer out a deal. That was something that  
22 was discussed.

23 But how do you get away -- how could there ever be a class  
24 rep in this type of case?

25 **THE COURT:** I'm not sure.

1           **MR. ARNS:** And the point is, I don't see a conflict  
2 there. And that's why people have to step forward. We had  
3 amazing class reps. We had people who were very devoted to  
4 this cause, and were willing to take on the cause.

5           **THE COURT:** None of that is -- I'm not, for purposes  
6 of this question, questioning any of that. They could be the  
7 greatest class representatives of all times.

8           The question is a structural question, and that is what  
9 I'm trying to get a handle on. I'm not suggesting that I think  
10 it does create that conflict, but it's an interesting issue in  
11 a 3344 case.

12           **MR. RHODES:** He's trying to erect a structural  
13 disincentive argument. He's saying that there's a structural  
14 built-in disincentive to take the case to distance.

15           **THE COURT:** Right.

16           **MR. RHODES:** He's wrong factually because, unlike  
17 *Experian*, the *Radcliffe* case, where there was a built-in  
18 *de jure* condition that the court didn't like, here there was  
19 the opposite.

20           Section 2.7 of the amended settlement agreement says,  
21 whatever incentive award -- because that has to be the *quid pro*  
22 *quo* that he's trying to generate here -- "I took a larger  
23 incentive award to shirk myself from that exposure." That's  
24 his argument, I think. And he says that's a structural bias  
25 that you can never run away from.

1       The fact of the matter is --

2               **THE COURT:** I don't hear it that way. I don't hear  
3 it as controlling the amount of the incentive award. I hear it  
4 more as an interesting issue as to whether or not, because of  
5 the nature of 3344, a class representative has different,  
6 different issues.

7               **MR. RHODES:** Give up the ghost earlier, right? Isn't  
8 that the argument?

9               **THE COURT:** Yes.

10              **MR. RHODES:** But the fact of the matter is: When the  
11 did the case settle? It settled after seven expert reports.  
12 Thousands of documents were produced. Full-scale litigation,  
13 motions to dismiss. Rulings. Fully-briefed class cert. We  
14 were two days before the hearing.

15       This case settled when you want it to settle. Fully  
16 discovered, fully investigated, fully litigated.

17              **THE COURT:** Of course, the other answer, perhaps, is  
18 that 3344 is there. So if it is, in fact, such a Sword of  
19 Damocles, no one would be -- step forward to be a class  
20 representative.

21       So, the fact that they stepped forward is somewhat  
22 indicative of the fact that it is not the reason that the class  
23 will be sold out by the class representatives.

24              **MR. RHODES:** Right. And, what -- I'm making the  
25 point that the fact that they litigated it to the extent they

1 did, knowing that the fees on the other side are accruing all  
2 the time -- I mean, the fact of the matter is, for an  
3 individual in a class action, the cost bill, if it has to  
4 shift, that, in itself, in a fully-litigated case, is  
5 going to be sufficient. And there's no case law to suggest  
6 that.

7 **THE COURT:** Okay. Let's now talk about the  
8 objectors' points with respect to the minor subclass, and then  
9 we will -- I want to move to the fees issue right at the end.  
10 So --

11 **MR. RHODES:** So, there are two points that were  
12 raised, I thought, which is: We need to have separate  
13 representation for them, and that there wasn't symmetry of  
14 interests. I think I already identified for you a whole host  
15 of factors on the latter.

16 Let me tell you a story about W.T. He's a named  
17 representative Plaintiff. He's a minor. His father and him  
18 sat at a computer one day, and signed up for Facebook. And  
19 they did it together. The father opened a Facebook account,  
20 and W.T. opened a Facebook account.

21 We took their depositions. And we asked them, "Did you  
22 have your dad's consent?" Because the heart of these arguments  
23 all go to: Did you get consent; what kind of consent; was it  
24 implied; was it express?

25 But this is what's telling about whether this settlement,

1 from the standpoint of the minor class, is fair, reasonable,  
2 and adequate. Mr. Tate, the father, said at his deposition, he  
3 couldn't even remember who pushed the button. He looked over  
4 his son's shoulder as they signed up together. They went  
5 through the flow, they looked at the documents. They had done  
6 research before because he was very concerned, as a parent,  
7 about what would be involved with having his teenage son on  
8 Facebook. And they went through that flow together. And then  
9 he joined Facebook, himself. And then they friended each  
10 other, so the father could then monitor the son.

11 That man and his son stand up here today, in Court, and  
12 say, "This is a fair, reasonable, and adequate settlement."

13 He was the most informed actor on this stage because he  
14 represented the very crux of what this case was about: "What  
15 is going to happen to my minor child on Facebook?"

16 He signed up with his son, he approved it, he consented to  
17 it. And I will submit to you that he is a lot better judge of  
18 whether this settlement is fair, reasonable, and adequate for  
19 the purposes of the minors, and whether there's some  
20 distinction between minors and parents than these professional  
21 objectors, Your Honor.

22 **THE COURT:** What I hear the objectors saying, though,  
23 is that that scenario you just described is -- that's  
24 wonderful, that's the way -- it would be great if it always  
25 worked that way. But the injunctive relief terms here don't



1 always mean it's going to work that way.

2           **MR. RHODES:** No system is perfect. But, you know  
3 what? If we were trying this case -- which it seems is what  
4 Mr. Frank wants me to do, spend a bunch of my clients' money  
5 out in the audience -- and I'm glad they're here to hear  
6 that -- and try the case, would you be empowered as a judge?  
7 Could you, as a remedy, order me to create that new tool that  
8 tells you what sponsored stories you have been to? Could you  
9 order me, as a remedy, the things that Mr. Arns negotiated for?  
10 Could you order me to put a tool inside the parent's account to  
11 delete their minor child from all sponsored stories going  
12 forward? Could you order me to give a tool to a parent who is  
13 not on Facebook?

14           Remember, that's lost in the shuffle here. If you're a  
15 parent and you're not on Facebook, I'm going to give you a tool  
16 now to come into the ecosystem and default your child.

17           Can you order me to do that? Or are those the kinds of  
18 injunctive relief you can only get through a negotiated  
19 arms-length non-collusive settlement?

20           **MR. ARNS:** Your Honor, you have the mockups of the  
21 injunctive relief. We haven't even had a chance to go through  
22 those.

23           **THE COURT:** I have them, though.

24           **MR. ARNS:** Yes. And we negotiated very hard to get  
25 that, because we wanted the minors to do the right thing.

1 And this settlement allows the minors to do the right  
2 thing. And that is, say exactly what their age is. As opposed  
3 to finding out if there's going to be an e-mail to my mom and  
4 dad every day. And that would never work, in a million years.  
5 They're just going to say they're a different age.

6 So, there's a lot of issues at play here, Your Honor. And  
7 that's how our negotiation worked.

8 And also, with Mr. Frank, with Mr. Fellmeth, would they be  
9 willing to take on this case, going back to 3344? Do they want  
10 to put \$20 million in trust? Do they want to ensure that there  
11 is going to be the same amount of injunctive relief that the  
12 Court cannot order? Do they want to be subject to the 3344 fee  
13 and cost shifting, and take over this case?

14 I had a case in Oregon one time, Your Honor, that I  
15 settled for about \$4 million. It was a death case. And we had  
16 the clients basically -- we had the waiver of the conflict --

17 **UNIDENTIFIED MAN:** Objection, Your Honor.

18 **THE COURT:** Don't -- no, audience comments are not  
19 part of the proceedings.

20 Go ahead, Mr. Arns.

21 **MR. ARNS:** And the court had to approve it, even  
22 though minors weren't involved. Then the attorneys came on to  
23 settle the proration of who would get what, the wife or the  
24 parents.

25 And basically what happened, Your Honor, is the attorneys

1 came in for the parents and said, "It was the worst settlement  
2 in the world, you didn't get enough money. You should have got  
3 a lot more."

4 And I said, "Fine. Put \$4 million in trust, take over the  
5 case."

6 Next day, "This is a fantastic settlement."

7 There's no skin in the game with these objectors. And  
8 when we talk about the issues, we -- we have developed this so  
9 the minors, going back to the minors, gone through all the  
10 issues before, so they can do the right thing.

11 And we believe this will set the appropriate standard for  
12 Google Plus and every other social media site that exists.

13 **MR. RHODES:** Your Honor, let me just make a final  
14 rhetorical point to you.

15 I was struck by the Schachter objectors and some of the  
16 other objectors. And they're complaining, as you point out,  
17 that they really want to engineer new social policy in this  
18 realm.

19 But the Court should be asking himself: Why didn't they  
20 just opt out then?

21 **MR. ARNS:** I would --

22 **MR. RHODES:** Why don't they opt out? If this is such  
23 a terrible deal, opt out, bring your individual cause of action  
24 and see what happens under 3344.

25 Because I'm going to go back to Judge Koh, in her ruling

1 on Page 29 (As read):

2 "To win..."

3 She says to survive, they're going to have to prove,  
4 quote:

5 "...proveable commercial value to their name and  
6 likeness."

7 And that is what became untenable in this case. And as  
8 the case was litigated and the parties realized that  
9 fundamentally the notion that you could prove that for a  
10 noncelebrity endorsement, which is the heart of this case, it  
11 doesn't ultimately end up being a case that has the merits that  
12 these people want you to believe.

13 **MR. ARNS:** I disagree with that, Your Honor.

14 **THE COURT:** I understand, I understand. And that is  
15 well-covered in the briefs. And I recognize that each side  
16 still has a very strong view of the merits of the case and the  
17 defenses, and I understand that.

18 So let's now address the fee issue, and we will call it a  
19 day.

20 **MR. RHODES:** For your benefit, Your Honor, we have  
21 said what we have to say on the subject in our brief.

22 **THE COURT:** Yes, thank you. And I have reviewed your  
23 presentation.

24 So, Mr. Arns.

25 **MR. ARNS:** Yes. Your Honor. With respect to the

1 discovery in this case, Slide 15 sets forth all the discovery.  
2 It's all fully been briefed.

3 There was a lot of futile jousting that went on in this  
4 case, Your Honor. We were trying not -- to knock each other  
5 off our horses. This was not pretty discovery. Twenty-one  
6 depositions, over 200,000 pages of documents, and multiple  
7 briefs having to do with every subject. This was a very  
8 hard-fought case. And Facebook knew we learned it all. We  
9 also knew that we could try this case. This case was ready to  
10 try.

11 If we go to Slide No. 16, expert discovery, Your Honor --

12 **THE COURT:** Why shouldn't this -- and let me  
13 introduce my question by stipulating, for purposes of this  
14 discussion, that a great deal of work was done at a very high  
15 level from the perspective of the lawyering that went on.

16 Why shouldn't this be a lodestar case, and not a  
17 percentage of the fund?

18 And you know that I have some problems with the -- with  
19 the valuation placed on the injunctive relief. So, why  
20 shouldn't this be approached from the lodestar perspective?

21 **MR. ARNS:** It could be approached from the lodestar,  
22 but we're still going to ask for a multiplier, Your Honor, on  
23 that.

24 And if I could just say one thing. If you want to take  
25 the state standard or federal standard on that, we can approach

1 it many different ways. We can have a lodestar crosscheck to  
2 the percent. And that could work. But we're going to ask for  
3 that multiplier.

4 One of the things that happened, Your Honor, in our expert  
5 depositions, there was another firm brought in. Facebook hired  
6 another law firm. The Cooley firm had represented some of the  
7 expert witnesses. Gibson & Dunn was brought in for other  
8 expert witnesses.

9 Now, I did all of those depositions, all of the  
10 preparation, all of the questioning of the defense experts.  
11 And what happened -- I considered that a tremendous compliment,  
12 Your Honor, that they had to -- that Facebook had to bring in  
13 another firm.

14 That being said, let me just say this: If I had a social  
15 media company and I got in a problem, I would hire the Cooley  
16 team to represent me. I don't think they had to bring in  
17 Gibson & Dunn.

18 And there have been comments, when we talk about fees, the  
19 small firm versus the large firm, the different overhead, they  
20 don't know what overhead is, Your Honor, of large firms,  
21 because everything is paid for by the client. Nothing is paid  
22 for by any clients, as a plaintiffs' contingency lawyer, which  
23 I've done all my life. And I'm very proud to be in that  
24 situation, Your Honor. And --

25 **THE COURT:** So it's not just a question of how much

1 the other side paid. The corporate defendant makes its own  
2 decision about how much it is going to pay for its lawyers, and  
3 that is their business.

4 **MR. ARNS:** That's correct.

5 **THE COURT:** The reason your fees are my business is  
6 because you are proposing to have it come out of the fund that  
7 goes to the class members.

8 **MR. ARNS:** That's correct, Your Honor.

9 **THE COURT:** So that's why I am focused on yours. So,  
10 the fact that there may be very expensive lawyers on the other  
11 side goes -- is really not -- it is -- I can see why you point  
12 to it, to say this is a very complicated, difficult case, and  
13 that you were against formidable opponents. And that is a fair  
14 point.

15 But, how much these firms charge the corporate defendant  
16 is really not particularly of consequence in terms of assessing  
17 your fees, I don't think.

18 **MR. ARNS:** Well, Your Honor, the question is: Is it  
19 a question of what I am worth? And I would be glad to have an  
20 in-camera session, showing you my last ten years of tax  
21 returns. I would be happy --

22 **THE COURT:** One of the concerns that is expressed in  
23 Facebook's brief is that there isn't -- and I know, for senior  
24 counsel who are experienced, it can be frustrating, but in  
25 terms of declarations that support various billing rates, I

1 don't have that.

2           **MR. ARNS:** We do, Your Honor, we have submitted two  
3 declarations of that.

4           **THE COURT:** Okay. Which ones?

5           (Off-the-Record discussion between counsel)

6           **MR. ARNS:** Yeah, the Richard Pearl declarations, we  
7 have two of those, Your Honor, that lay it out.

8           **THE COURT:** You are talking about in this community,  
9 comparable work, and the like? I'll go back and look at it.

10           **MR. ARNS:** Exactly. And, you know, in my 38 years of  
11 experience, if it's getting down to my billing rates,  
12 Your Honor, I don't think anybody has done more Masters in  
13 Trials presentations than I have, in ABOTA.

14           I've written two best-selling treatises for The Rutter  
15 Group, which I think is the best California legal publisher,  
16 *The Evidence Wheel* and *The Trial Wheel*, which is federal and  
17 state version, Your Honor, both; that basically I have been  
18 practicing for 38 years.

19           The largest plaintiff trial bar in the United States is  
20 the Consumer Attorneys of California. I have been nominated as  
21 Trial Lawyer of the Year numerous times; been Trial Lawyer of  
22 the Year, San Francisco Trial Lawyers; a professor at the  
23 University of San Francisco Law School, and was Professor of  
24 the Year, teaching trial practice for the last 15 years, or  
25 12 years.



1 I have numerous succession of cases, of victories that  
2 aren't -- I don't know if anybody else has, in trials. With  
3 respect to class actions, I've done approximately 17 of them  
4 now; none have gone to trial.

5 **THE COURT:** I'm focusing now on the rates. All of  
6 this is in the pleadings, --

7 **MR. ARNS:** That's correct, Your Honor.

8 **THE COURT:** -- and I'll go through it. What I should  
9 do, whoever -- whichever objector wanted to make a specific  
10 comment with respect to the fees, and there was one --

11 **MR. ARNS:** Yes.

12 **THE COURT:** I'll let whoever that is come up, very  
13 briefly, and make whatever particular objection. I have a very  
14 lengthy submission -- come forward -- from Facebook on the  
15 fees, and so I have a good deal of information already, but I  
16 will -- and I'll let you respond, Mr. Arns.

17 **MR. ARNS:** Thank you.

18 **THE COURT:** But, let's go ahead. And remind me  
19 again, sir, your --

20 **MR. SHERWOOD:** Thank you, Your Honor. My name is  
21 Alan Sherwood. I'm appearing for objector Jennifer Deachin.

22 **THE COURT:** Yes.

23 **MR. SHERWOOD:** At this point, Your Honor I'll submit  
24 on the briefs that have been submitted.

25 **THE COURT:** Very well.

1           **MR. SHERWOOD:** It's a late hour; we've had a lot of  
2 argument.

3           **THE COURT:** Thank you. Go ahead, Mr. Arns.

4           **MR. ARNS:** Your Honor, again, the hallmark of our  
5 settlement is the injunctive relief.

6           Now, Mr. Kevin Osborne, one of the attorneys in my office  
7 who has a master's degree in economics, I would like him to  
8 spend one minute just addressing the option method of  
9 evaluating.

10          **THE COURT:** Okay.

11          **MR. ARNS:** He knows a little bit more about economics  
12 than I do, Your Honor. Whenever I call an economist in to  
13 trial, they don't even like me to ask questions, because I have  
14 a little problem with it.

15          **THE COURT:** Very well.

16          **MR. OSBORNE:** Thank Your Honor. Kevin Osborne for  
17 the Plaintiffs. Good afternoon.

18          **THE COURT:** Good afternoon.

19          **MR. OSBORNE:** I'll cut to the chase. What we have  
20 presented to the Court was a series of economic models for  
21 valuing the injunctive relief in this case.

22          All economic models rely on foundations. And in this  
23 particular instance, there are three foundations -- three  
24 pillars of the foundation for all of our economic models.

25          First, the idea behind the case was that Facebook, through

1 its sponsored stories programs, was misappropriating  
2 endorsements of users. The question that follows that is  
3 whether an endorsement is worth any money. If it's a valuable  
4 asset. And the answer must be yes, because Facebook was  
5 driving its ad revenues through the use of sponsored stories  
6 because they have a high CTR, because this is the holy grail of  
7 advertising. This is what advertisers want, and they'll pay  
8 more money for it.

9 So, assuming those two pillars to be true, the next pillar  
10 would be since the thrust of our injunctive relief is giving  
11 control of this asset to the users, have we given control of a  
12 valuable asset to the users?

13 Now, based on the fact that sponsored stories derive -- or  
14 deprive --

15 **THE COURT:** Value, of course, is only limited to the  
16 particular network that the user has decided to create within  
17 the Facebook world. We're not talking about celebrities,  
18 right?

19 **MR. OSBORNE:** That's absolutely true. And that leads  
20 to the question of: So what? If it is a valuable asset, what  
21 is an individual user who is not a celebrity going to do? If  
22 they discontinue their use of sponsored stories, are they going  
23 to then go sell their endorsement to someone else?

24 **THE COURT:** If the likeness has no value in the  
25 marketplace, other than the -- the network created by that

1 particular individual, the models of that -- that's where I  
2 continue to have difficulty seeing how you can simply look at  
3 and -- take an example, you know, Facebook achieves a \$1 profit  
4 from using my name within the network that I have.

5 And you then say, well, that's the value to me, I get the  
6 dollar, I get a subset of the dollar. And I -- I don't think  
7 one flows from the other. It's easy with a celebrity or  
8 somebody who is marketing their likeness. But we are in a very  
9 different world.

10 And I'm not saying I wouldn't necessarily, at the end of  
11 the day, find that there was some value. But --

12 **MR. ARNS:** Your Honor.

13 **THE COURT:** -- these theories all seem to just take  
14 -- to operate in a marketplace that is not this marketplace.

15 **MR. ARNS:** The brilliant thing that occurs on  
16 Facebook, Your Honor, is they get the friend endorsement. And  
17 the friend endorsement -- the sponsored stories only go to  
18 friends, or you can dictate who you want it to go to. You can  
19 dictate you don't want it to go to your parents, or it can go  
20 to your parents. But the point is -- or friends in a certain  
21 group.

22 The point is Facebook knows and online media operations  
23 know the best endorsement is the friend endorsement, not a  
24 celebrity.

25 **THE COURT:** That is again focusing entirely on the

1 benefit to Facebook. Where's the harm to the user? Where is  
2 the harm?

3 **MR. ARNS:** Okay. This is not a benefit to Facebook.  
4 This is a benefit, first of all, to the advertiser. And  
5 they're willing to pay the money because they want your friend  
6 endorsement.

7 And that's why we determined that there are damages on  
8 that. And that we got by the harm in this case, Your Honor.  
9 And that's why this injunctive relief, having control over that  
10 is extremely valuable. And, we would request that you put --  
11 that you say it's extremely valuable, difficult to evaluate.  
12 We think this option value is the way to go on it, Your Honor.

13 And --

14 **THE COURT:** That's your -- you've got a fair market  
15 value and a real option value and a minimum value. So you're  
16 saying the real option value is your preferred method.

17 **MR. ARNS:** Yes. And that's Slide No. 44, Your Honor.

18 Again, Judge Davila specifically stated -- we have the  
19 cite for that -- that you have to look at the value of the  
20 injunctive, also.

21 But at any rate, Your Honor, we're past time. Thank you  
22 very much. We submit. And --

23 **THE COURT:** Very well.

24 **MR. ARNS:** Appreciate it.

25 **THE COURT:** Thank you. Very good argument. And I'll

1 go back and do my work, and give you an order.

2           **MR. RHODES:** Thank you, Your Honor.

3           **THE COURT:** Thank you.

4           (Conclusion of Proceedings)

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**CERTIFICATE OF REPORTER**

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Belle Ball\_\_\_\_\_

Thursday, November 21, 2013

Belle Ball, CSR 8785, CRR, RDR